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Supreme Court, U.S.
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No. ———

In The

Supreme Court of the United States

October Term, 1987

———o———

WARREN CITY SCHOOL DISTRICT BOARD OF EDUCATION, ROBERT L. PEGUES, ANTHONY BERARDUCCI, NICHOLAS ANGELO, BART WILSON AND WILLIAM HAAS

Petitioners,

v.

ALAN MILES RUBEN AND JEANNE RATHBUN,

Respondents.

———o———

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

———o———

CHARLES L. RICHARDS,
Counsel of Record

RICHARDS, AMBROSY & FREDERICKA
Suite 300, The First Place
159 East Market Street
Warren, Ohio 44481
(216) 373-1000

Counsel for Petitioners Warren City School District Board of Education, Robert L. Pegues, Anthony Berarducci, Nicholas Angelo, Bart Wilson and William Haas

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
or call collect (402) 342-2831

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QUESTIONS PRESENTED

1. When defendant files a motion for an award of attorney fees against a plaintiff and plaintiff's counsel, pursuant to 28 U.S.C. § 1927, what standard must the district court apply to determine if counsel "unreasonably and vexaciously" multiplied the proceedings.

2. May the court of appeals, on appeal of an award of attorney fees made in favor of a defendant and against a plaintiff and her attorney reverse the award on the basis of an "abuse of discretion" without also finding that the trial court's findings of fact and conclusions of law issued under Fed. R. Civ. P. 52(a) are clearly erroneous.

3. When counsel for plaintiff is found to have been guilty of conducting litigation "in bad faith" and an award of attorney fees against plaintiff's counsel in favor of the defendant is based upon such a finding, is the award of attorney fees limited to the "excess" costs, expenses and attorney fees incurred because of such conduct, even if the proper handling of the case would have revealed the case to be frivolous in fact, or where the bad faith conduct includes especially egregious acts such as prosecution of the case to extract money from the defendants.

4. What is the effect to be given by a federal district court in deciding a motion for an award of attorney fees against plaintiff and plaintiff's counsel, of the fact that an administrative agency, such as a state civil rights commission, made a finding of probable cause that discrimination had occurred.

5. What is the procedure to be followed by the federal district court in ruling on a motion for an award of attorney fees when the motion is directed against both the plaintiff and her counsel, especially when plaintiff does not appear at the hearing on the motion or when plaintiff's counsel abandon plaintiff and argue to preserve their own interests.

LIST OF PARTIES

Other parties, in addition to those listed in the caption of the complaint are the individual school board members at the time that the suit was filed in the district court, namely:

Catherine Swan
Henry Angelo
Willard Ruben
Raymond Tesner
Mary Milheim

In addition, the district court's award of attorney fees was made against two other attorneys not involved in this appeal who are:

Elliott Lester
Keith Weiner

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WARREN CITY SCHOOL DISTRICT BOARD OF EDUCATION, ROBERT L. PEGUES, ANTHONY BERARDUCCI, NICHOLAS ANGELO, BART WILSON AND WILLIAM HAAS

Petitioners,

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners the Warren City School District Board of Education, Robert L. Pegues, Anthony Berarducci, Nicholas Angelo, Bart Wilson and William Haas respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, filed on July 30, 1987.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, Case Nos. 85-3986 and 85-3987, is reported at 825 F.2d 977 and is reproduced in Appendix A. (App. 1-30).

The district court's order awarding attorney fees was filed on October 22, 1985 and is unreported. This order is reproduced in Appendix B. (App. 31-62).

The findings of fact and conclusions of law of the United States District Court for the Northern District of Ohio, Eastern Division, Case No. C80-1914-Y, were filed October 22, 1985, and are unreported. These findings and conclusions are reproduced in Appendix C. (App. 63-72).

JURISDICTION

The judgment of the Sixth Circuit Court of Appeals was entered on July 30, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Civil Rights Act of 1964, Title VII, Sec. 706(K), 42 U.S.C. § 2000e-5(k):

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States,

a reasonable attorneys fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

28 U.S.C. § 1927:

Any attorney or other person admitted to conduct cases in any court of the United States or any territory thereof who so multiplies the proceedings in any case unreasonably and vexaciously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

STATEMENT OF THE CASE

Plaintiff Jeanne Rathbun was a naturalized citizen of the United States of French origin. Plaintiff was hired by petitioner, Warren City School District Board of Education (Board of Education), in 1973 as a substitute janitor. In October 1975, plaintiff became a regular employee of the Board of Education as opposed to a substitute employee. Plaintiff worked in various school buildings operated by the Board of Education until December of 1981, when she took a "medical leave" of absence and never worked again within the Warren Board of Education school system.

On September 11, 1978, plaintiff filed a complaint with the Ohio Civil Rights Commission charging discrimination in connection with her employment. She also filed charges with the Equal Employment Opportunity Commission on October 16, 1978. In her Ohio Civil Rights Commission complaint, plaintiff alleged sex discrimination by the "Warren City Schools" and mentioned acts by Bart Wil-

son, a foreman of custodians and janitors, William Haas, head custodian of the school system, and Steve Hudock, assistant head custodian of the school system. In her Equal Employment Opportunity Commission charge, plaintiff also alleged sex discrimination by "Warren City Schools" and likewise mentioned Wilson, Haas, and additionally mentioned Nicholas J. Angelo, once athletic director and then supervisor of business operations for the school system.

In March 1979 the Ohio Civil Rights Commission issued a determination of probable cause that plaintiff's allegations established a case of sex and national origin discrimination. The Equal Employment Opportunity Commission declined to pursue the matter in its own right and issued a right to sue letter in July of 1980.

On October 16, 1981, plaintiff filed an action in the United States District Court for the Northern District of Ohio alleging employment discrimination and seeking relief under Title VII of the Civil Rights Act of 1964 as amended, 42 USC § 2000(e) et seq. The original complaint was filed by Attorneys Shenyey, Berman and Abakumov of Cleveland, Ohio. In addition to the Board of Education, the defendants named in the original complaint were Robert L. Pegues, Superintendent of the Warren City Schools; Anthony R. Berarducci, Assistant Superintendent of the Warren City Schools; the five members of the Board of Education at the time the suit was filed (Catherine C. Swan, Henry Angelo, Willard Rubin, Raymond Tesner and Mary Milheim), and also Nicholas J. Angelo, Bart Wilson, William Haas, Steven Hudock and a fellow janitor, Bernie Wilson, who died during the pendency of the action.

Shenyey, Berman and Abakumov withdrew from the case later in calendar year 1981. The defendants' motions for attorney fees were not in any way directed at Shenyey, Berman and Abakumov, but instead were directed at their successors as counsel for plaintiff.

Plaintiff eventually filed a second amended complaint and again alleged violations of Title VII of the Civil Rights Act of 1964, 42 USC § 2000(e) et seq. The second amended complaint became the operative pleading in terms of relief requested by plaintiff.

Mrs. Rathbun alleged that she had been discriminated against on the basis of her sex and national origin. That discrimination allegedly took the following forms:

1. Denial of equal overtime
2. Verbal abuse
3. Involuntary transfer
4. Disparate workloads

On June 26, 1984, a trial to the court commenced in the United States District Court for the Northern District of Ohio before the Honorable Sam H. Bell. At the conclusion of Mrs. Rathbun's case on June 29, 1984, Judge Bell granted motions for dismissal under Fed. R. Civ. P. 41(b) on behalf of all defendants. On July 10, 1984, judgment was entered in favor of all defendants dismissing Mrs. Rathbun's complaint with prejudice and findings of fact and conclusions of law were adopted by the trial court.

Mrs. Rathbun filed a notice of appeal on the merits of her claim on August 6, 1984. On September 24, 1984 the Sixth Circuit Court of Appeals dismissed Mrs. Rathbun's

appeal for want of prosecution under Rule 18 of the local rules of the Sixth Circuit. A certified copy of that order was filed in the trial court on October 19, 1984.

The individual school board members then filed a motion for attorney fees in the trial court on or about October 29, 1984. A second motion for attorney fees was filed on behalf of the Board of Education and all other defendants on January 9, 1985. After the filing of briefs and an oral hearing on March 15, 1985, which was not attended by Plaintiff Jeanne Rathbun herself but by her then attorney, the district judge granted both motions for attorney fees on October 22, 1985.

In his order granting fees, the district judge directed the fees incurred on behalf of the individual school board members to be paid as follows:

Mrs. Rathbun	$ 8,321.17
Attorney Weiner	150.00
Attorney Lester	2,500.00
Attorney Ruben	2,500.00
	$13,471.17

The Board of Education and other individual defendants were awarded fees to be paid as follows:

Mrs. Rathbun	$27,838.04
Attorney Weiner	350.00
Attorney Lester	2,500.00
Attorney Ruben	2,500.00
	$33,188.04

Thus, Attorney-Respondent Alan Miles Ruben was ordered to pay only $5,000 of a total award of $46,959.21. Attorney Ruben's share of the total attorney fee award was 10.7%.

From that order, an appeal was pursued on behalf of Mrs. Rathbun and Attorney-Respondent Alan Miles Ruben. Mrs. Rathbun's other attorneys in the trial court, Elliott Lester and Keith Weiner, did not appeal to the Sixth Circuit Court of Appeals.

Mr. Lester entered his appearance in the case on October 5, 1981 as successor to Shenyey, Berman and Abakumov. On January 25, 1982, Mr. Ruben entered his appearance as "additional counsel" on behalf of Mrs. Rathbun. Ruben was a law professor from Cleveland Marshall College of Law, Cleveland, Ohio, and was brought in to help the inexperienced Elliott Lester, apparently because of Ruben's alleged experience in Title VII cases.

On March 15, 1982, about six weeks after Mr. Ruben made his appearance as counsel, Mrs. Rathbun's attorneys sent a letter over Attorney Elliott Lester's signature making a settlement demand of $54,000. That letter threatened defendants with the prospects of a "fifteen day trial, seventeen or more depositions" and "total additional legal costs . . . estimated at well over One-hundred Thousand Dollars." The letter went on to list twenty-two individuals to be deposed in Cleveland with depositions "expected to last eight hours per day per person."

In spite of the direct threat in the letter, Mrs. Rathbun's attorneys did not depose a single person and no worthwhile discovery was ever employed by plaintiff's counsel.

Mrs. Rathbun's attorneys filed a motion to disqualify all counsel on January 1, 1983. That motion sought to disqualify all defense counsel in this case, nearly two and one-half years after the action was commenced, on the basis of an alleged "conflict of interest" where absolutely none existed. The motion was totally without substance or merit. The motion to remove counsel for conflict of interest was apparently the brain child of Attorney Ruben who played a significant role in the planning and strategy of the motion. The motion was overruled on August 18, 1983.

Plaintiff's counsel did not comply with District Judge Bell's pretrial order issued on March 29, 1984. In his order, Judge Bell required counsel to submit to the court proposed witness lists, pre-marked exhibits, proposed findings of fact and conclusions of law, and trial briefs. Although defense counsel complied with that order in every respect, Mrs. Rathbun's attorneys did not comply in any regard prior to trial nor did they request leave to comply until admonished by the trial judge on the first day of trial.

On the first day of trial, the proceedings were delayed because Mrs. Rathbun's attorneys were late. The proceedings were further delayed because of her attorneys' total neglect in complying with the court's pretrial order. Both Mr. Ruben and Mr. Lester attended the first day of trial. Thereafter, Mr. Ruben abandoned Attorney Lester, and left him alone to prosecute the case, although Mr. Ruben never withdrew as counsel and never explained his absence.

On the second day of trial Mrs. Rathbun's attorneys filed their pre-trial submissions which contained a witness list of twenty-one people. That witness list included the

name of an individual who had died approximately eleven months prior to trial and whose death was made part of the record in this case on September 12, 1983.

On the third day of trial, Mrs. Rathbun did not produce witnesses to occupy the trial court's daily schedule. The only witnesses to have testified at that point were Mrs. Rathbun, her husband, a personal friend, and Nick Angelo, the defendants' representative at trial. Mr. Lester acknowledged to the court that none of the other witnesses on Mrs. Rathbun's witness list had been subpoenaed or even notified that they might be called as witnesses.

On the fourth and final day of trial, six witnesses were called to testify. At the conclusion of their testimony, Mrs. Rathbun rested and moved through her counsel for a judgment on her behalf. That motion was denied. Motions were then made on behalf of each defendant for judgment under Civil Rule 41(b) and those motions were granted. Judge Bell then filed findings of fact and conclusions of law.

The proceedings culminating in the award of attorney fees against Mrs. Rathbun and her attorneys then followed.

In his thirty-three page award of attorney fees (Appendix B) the district court judge made a number of express findings and conclusions regarding the conduct of counsel and the nature and quality of the plaintiff's lawsuit. (App. 53-56). The judge determined that:

1. The filing and prosecution of the action against all of the individual defendants was a frivolous and unwarranted act as defined in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978).

2. Plaintiff, from the inception of this action, and her counsel, from the time they entered appearances in the case, acted with the intent to extract some monetary settlement from the several individuals associated with the school system because of the threat of defending and expense of litigating this action.

3. Plaintiff, Mr. Lester and Mrs. Ruben all acted without requisite good faith by charging and prosecuting the individual defendants when they neither had nor produced a single thread of evidence against these defendants.

4. The action against the Warren Board of Education was brought by the plaintiff and prosecuted by Mr. Lester and Mr. Ruben in bad faith.

5. The action against the Warren Board of Education was totally unsupported by any evidence of discriminatory conduct and must be considered to be frivolous without foundation in fact and lacking in good faith.

6. Both Mr. Lester and Mr. Ruben knew, or should have known, that the prosecution of the action was warrantless.

7. The activities of counsel presented an unparalleled example of an abusive use of the system of justice in the civil rights area.

On appeal, the Sixth Circuit Court of Appeals reversed and remanded the case to the trial court for further proceedings. In doing so, the court of appeals invited inquiry "as to Rathbun's liability for defendants' costs and Ruben's liability under the district judge's inherent power, or 28 USC § 1927." The Sixth Circuit Court of Appeals expressly noted that on remand:

> [W]e contemplate that the district judge will require defendants' attorneys to amend their motions to identify the claimed misconduct by Ruben and the extra efforts required by them as a result. The district judge can then proceed to consider their motions anew. (App. 30).

The Sixth Circuit Court of Appeals completely wiped out the award of attorney fees against plaintiff, but left it to the trial court to determine whether plaintiff, because of her possible indigency, should be held responsible for costs in the trial court which amount to more than three thousand dollars.

WHY THE WRIT SHOULD BE GRANTED

THIS CASE ILLUSTRATES THE MANY PROBLEMS FACING FEDERAL DISTRICT COURTS IN RULING ON A MOTION FOR AN AWARD OF ATTORNEY FEES AND ALSO DEMONSTRATES THE PROBLEMS FACING THE CIRCUIT COURTS OF APPEAL UPON REVIEW OF THESE AWARDS. THE PROBLEMS RAISED BY THIS CASE ARE SIGNIFICANT, OCCUR FREQUENTLY, AND HAVE YET TO BE ADDRESSED BY THE SUPREME COURT OF THE UNITED STATES.

The standard to be applied by the district judge in deciding whether attorney fees should be awarded to the defendant under 28 USC § 1927 is not uniform among the circuits. Indeed, very different standards are now being applied.

The most restrictive standard requires a showing of willful bad faith before an attorney can be sanctioned. *Ford v. Temple Hosp.*, 790 F.2d 342 (3rd Cir. 1986). The Ninth Circuit requires a showing of either reckless conduct or bad faith. *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Assn.*, 809 F.2d 626 (9th Cir. 1987).

The Sixth Circuit appears to apply yet another standard. The Sixth Circuit would not require a showing of intentional conduct or conscious impropriety, but would require more than mere negligence or inadvertence. *Jones v. Continental Corp.*, 789 F.2d 1225 (6th Cir. 1986); *Haynie v. Ross Gear Div. of TRW, Inc.*, 799 F.2d 237 (6th Cir. 1986), *cert. granted*, — U.S. —, 107 S.Ct. 1624 (1987). The Seventh Circuit also seems to follow an intermediate standard in holding that an express finding of bad faith is not required, however some degree of culpability must be shown, such as recklessness, or intentionally filing or prosecuting a claim which lacks a plausible legal or factual basis. *Knorr Brake Corp. v. Harbil, Inc.*, 738 F.2d 223 (7th Cir. 1984); *In re TCI, Ltd.*, 769 F.2d 441 (7th Cir. 1985). The Sixth and Seventh Circuits seem to state a reasonable person standard, in that an attorney can be sanctioned under § 1927 where a reasonably careful attorney would have known or should have known that a claim was frivolous or that litigation tactics would needlessly delay or obstruct the progression of the lawsuit. *Jones*, 789 F.2d 1225 (6th Cir. 1986); *In re TCI, Ltd.*, 769 F.2d 441 (7th Cir. 1985); *Knorr Brake Corp.*, 738 F.2d 223 (7th Cir. 1984).

Some circuits require a showing of bad faith or malice. *In re TCI, Ltd.*, 769 F.2d 4411 (7th Cir. 1985); *Dreiling v. Peugeot Motors of America, Inc.*, 768 F.2d 1159, 1165 (10th Cir. 1985); *United States v. Austin*, 749 F.2d 1407, 1408 (9th Cir. 1984); *Shimman v. International Union of Operating Engineers*, 744 F.2d 1226, 1230 (6th Cir. 1984). Some circuits measure the conduct of counsel against accepted standards of conduct used in litigation. *Knorr Brake v. Harbil, Inc.*, 738 F.2d 223 (7th Cir. 1984); *Colucci v. New York Times Co.*, 533 F. Supp. 1011 (S.D.N.Y.,

1982). Other jurisdictions, including the Sixth Circuit, have refused to apply the stringent bad faith or malice test, and have applied the most objective test of all, which involves an analysis of whether counsel filed or prosecuted a case which was without plausible legal or factual basis. *Knorr Brake v. Harbil, Inc.*, 738 F.2d 223 (7th Cir. 1984); *Lewis v. Brown & Root, Inc.*, 711 F.2d 1287 (5th Cir. 1983), *aff'd in part on reconsideration*, 722 F.2d 209 (5th Cir. 1984), *cert. denied*, 464 U.S. 1069, 467 U.S. 1231 (1984); *Indianapolis Colts v. Mayor & City Council*, 775 F.2d 177 (7th Cir. 1985); *Jones v. Continental Corp.*, 789 F.2d 1225 (6th Cir. 1986).

The very opinion which this Court is being asked to review demonstrates the problems which appellate courts are having in determining and applying a standard to gauge an attorney's conduct when a motion is filed under 28 USC § 1927. Indeed, the Sixth Circuit, in an apparent effort to find a way to reverse the studied opinion and order of the trial judge, has abandoned the precedent even its own circuit had previously set and came up with a new standard defined as:

> Conduct on the part of the subject attorney that trial judges, applying the collective wisdom of their experience on the bench, could agree falls short of the obligations owed by a member of the bar to the court and which, as a result, causes additional expenses to the opposing party. (App. 13).

It is certainly time for this Honorable Court to speak on an issue involving conflict, not only among the circuits, but within a given circuit, on such an important subject as motions for awards of attorney fees.

The standard of review is unclear and its application to particular cases has been inconsistent and has produced uneven, conflicting appellate decisions.

While the standard of review in the reported cases appears to be one of "abuse of discretion," a problem arises whenever the district court makes express findings and conclusions in its attorney fee award as did Judge Bell in the instant case. The question presented by this appeal, because of the manner in which the Sixth Circuit largely ignored the trial judge's findings of fact and conclusions of law, is whether a reviewing court may find that an abuse of discretion has occurred without first making a determination that the underlying evidence makes the trial court's findings of fact and conclusions of law upon which the attorney fee award is based clearly erroneous.

When the test is abuse of discretion, reversal should be both difficult and rare, yet it appears that awards by district court judges, which are becoming more frequent, and which are made by the person in the best position to judge the conduct of counsel, are being reversed on a very regular basis by the reviewing courts. Further, the precedent established by the opinion of the Sixth Circuit herein establishes a procedural framework which is cumbersome, largely unnecessary and which will result in a proliferation of the very "satellite litigation" which the Sixth Circuit seeks to avoid. (App. 29).

Petitioner submits that if Judge Bell's carefully considered, thirty-three page opinion awarding attorney fees on the basis of numerous specific findings of misconduct and bad faith on the part of plaintiff and counsel is subject to reversal as an abuse of discretion, then it is cer-

tainly time for this court to step in and clarify this entire subject matter, both substantively and procedurally, for the bench and bar.

CONCLUSION

For the foregoing reasons a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

CHARLES L. RICHARDS,
Counsel of Record

RICHARDS, AMBROSY & FREDERICKA
Suite 300, The First Place
159 East Market Street
Warren, Ohio 44481
(216) 373-1000

Counsel for Petitioners
Warren City School District Board of Education, Robert L. Pegues, Anthony Berarducci, Nicholas Angelo, Bart Wilson and William Haas

APPENDIX A

Nos. 85-3986/3987

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: ALAN MILES RUBEN, *Attorney-Appellant,* (85-3987)	
JEANNE RATHBUN, *Plaintiff-Appellant,* (85-3986) v.	ON APPEAL from the United States District Court for the Northern District of Ohio.
WARREN CITY SCHOOLS, ROBERT L. PEGUES, CATHERINE O. SWAN, HENRY J. ANGELO, WILLARD T. RUBIN, RAYMOND J. TESNER, MARY MILHEIM, ANTHONY R. BERARDUCCI, NICHOLAS J. ANGELO, BART WILSON, WILLIAM HAAS, STEVE HUDOCK, and BERNIE WILSON, *Defendants-Appellees.*	

Decided and Filed July 30, 1987

Before: WELLFORD and NORRIS, Circuit Judges; and COHN, District Judge.*

*Honorable Avern Cohn, United States District Court for the Eastern District of Michigan sitting by designation.

COHN, District Judge. This appeal raises questions about the propriety of sanctions against a plaintiff and one of her attorneys arising out of a sex and national origin discrimination case filed under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* For the reasons that follow, we reverse the sanctions against plaintiff and her attorney and taxation of costs against plaintiff, and remand the case for further consideration by the district judge.

I. STATEMENT OF THE CASE

Plaintiff, Jeanne Rathbun, is a naturalized citizen of the United States of French origin. She worked as a janitor at several school buildings in the Warren, Ohio public school system from 1973 to the time she filed the underlying action in 1980, including East Junior High School ("East"), Warren G. Harding High School ("Harding"), and Devon Elementary School ("Devon"). Throughout this period, she alleged that she was denied overtime equal to male janitors and was subjected to physical and verbal abuse and disparate workloads. She claimed a retaliatory transfer from East to Harding in September of 1974 and a retaliatory transfer again in May of 1978 to Devon on account of her complaints of discrimination.

Rathbun filed a charge with the Ohio Civil Rights Commission ("OCRC") in September of 1978, alleging sex discrimination against "Warren City Schools" only[1] and mentioning acts by Bart Wilson, a foreman of custodians and janitors; William Haas, head custodian of the

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[1]Defendant's proper name appears to be Warren City School District Board of Education.

school system; and Steve Hudock, assistant head custodian of the school system. Rathbun also filed a charge with the Equal Employment Opportunity Commission ("EEOC") in October of 1978, again alleging sex discrimination by "Warren City Schools" only. The EEOC charge likewise mentioned Wilson, Haas, and, additionally Nicholas Angelo, athletic director and then supervisor of business operations for the school system, but it did not mention Hudock. (Rathbun did not complain in the EEOC charge about her time at East Junior High, and there is only an oblique reference to this period in the OCRC charge.)

In March of 1979, the OCRC found probable cause that Rathbun's allegations established a case of sex and national origin discrimination at each of the three buildings she had worked at. The finding was accompanied by a four-page summary of evidence based largely on interviews with Rathbun's co-workers. The EEOC declined to pursue Rathbun's charge and issued a right-to-sue letter in July of 1980. On the basis of the OCRC's attempts at conciliation, the Warren school board offered to allow Rathbun to transfer to any one of twenty-two job sites, including return to Harding. Rathbun refused to work elsewhere, and she declined the jobs offered at Harding in the belief that the jobs would be more strenuous than her old job. In declining the conciliation offers, Rathbun relied on the advice of her then attorneys—Shenyey, Berman & Abakumov.

Shenyey, Berman & Abakumov filed this case on October 16, 1980, within ninety days after Rathbun received the EEOC's right-to-sue letter. The individual defendants named were: the superintendent of the Warren

City School District at the time of suit (Robert Pegues); the assistant superintendent at the time of suit (Anthony Berarducci); the five members of Warren City School District Board of Education ("the school board defendants") at the time of suit (Catherine Swan, Henry Angelo, Willard Rubin, Raymond Tesner, and Mary Milheim), named in their "representative capacity"; Nicholas Angelo; Bart Wilson; Haas; Hudock; and a fellow janitor, Bernie Wilson.

Shenyey, Berman & Abakumov withdrew from the case in 1981. Defendants do not dispute that the withdrawal was unrelated to the merits of the case. Attorney Elliott Lester substituted as Rathbun's attorney and pursued the case through trial. Because of Lester's inexperience in Title VII cases, in January of 1982 he sought the assistance of appellant Alan Miles Ruben, a law professor from Cleveland Marshall College of Law. Ruben entered his appearance as "additional counsel" and, according to Lester, provided academic guidance only. The record reflects, however, that Ruben's role was actually more extensive. Lester also used a newly licensed associate, Keith Weiner, on the case for a year beginning in September of 1982.

After Rathbun's presentation of her case-in-chief over four days of trial, the district judge granted defendants' motion to dismiss on June 29, 1984. Fed. R. Civ. P. 41(b). Findings of facts and conclusions of law[2] were filed July

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[2]The district judge's findings of fact and conclusions of law, Fed. R. Civ. P. 52(a), total 11 pages. While he determined that Rathbun's case lacked factual and legal support, he did not characterize her case as "frivolous" or intimate that it was instituted or prosecuted in bad faith.

6, 1984; the order of dismissal was entered July 10, 1984. Rathbun filed a notice of appeal on August 6, 1984; the appeal was dismissed for want of prosecution on September 24, 1984. The mandate was filed with the district court on October 19, 1984.

The school board defendants filed a motion for attorneys' fees from Rathbun and her attorneys on various legal grounds on October 30, 1984. The other defendants filed a similar motion on January 9, 1985. The district judge held a hearing on the motions on March 15, 1985, at which Lester, Weiner, and defendants' attorneys argued. Ruben was present at the hearing; an attorney argued on his behalf. Although briefs were filed on Rathbun's behalf in opposition to the motions,[3] no one argued her position at the March 15 hearing.

On October 22, 1985, the district judge entered an order and opinion granting defendants' motions. Weiner was sanctioned $500 under Federal Rule of Civil Procedure 11 for filing a motion not well grounded in fact; he does not appeal. Lester was sanctioned $5,000; he also does not appeal.[4] Ruben likewise was sanctioned $5,000. While the district judge's opinion does not clearly delineate the legal grounds for sanctioning Ruben, his opinion mentions Federal Rule of Civil Procedure 11, 28 U.S.C. § 1927, and a judge's inherent power to punish bad faith

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[3]While the opinion awarding attorneys' fees states that no briefs were filed on Rathbun's behalf (Order at 2), the record contradicts this statement (see R. 123, 124).

[4]It appears from the record that Lester is no longer a member of the Ohio bar.

conduct during litigation. *See Roadway Express, Inc. v. Piper,* 447 U.S. 752, 765-67 (1980). The bulk of the sanction—$36,159.21—fell on Rathbun. Again, while the district judge did not clearly delineate the legal grounds for sanctioning Rathbun, the opinion offers alternative grounds. Like Ruben's sanction, the first ground cited for the sanction against Rathbun in the inherent power to punish bad faith litigation. The second ground described by the judge was that Rathbun's case was "frivolous, unreasonable, or without foundation. . . ." *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 421 (1978) (interpreting § 706(k) of Title VII, 42 U.S.C. 2000e-5(k)). The district judge also taxed costs against Rathbun.

II. TIMELINESS OF THE MOTIONS FOR ATTORNEYS' FEES

The school board defendants filed their motion almost four months after the district judge's findings of fact and conclusions of law and almost three months after the notice of appeal. The motion followed the dismissal of the appeal by less than two weeks. The other defendants filed their motion little more than two months later. There is no local rule in the Northern District of Ohio limiting the time period for the filing of a motion for attorneys' fees. The parties agree that instead of a strict time measure, the test is one of "reasonableness." They dispute the proper milestone for measuring the period and whether the motions here were filed within a "reasonable" time.

The district judge considered the timeliness issue in granting the motions, relying primarily on *White v. New Hampshire Dep't of Employment Sec.,* 455 U.S. 445 (1982). There, the Supreme Court upheld an award of attorney's

fees under 42 U.S.C. § 1988 where the motion for attorney's fees was filed four-and-one-half months after the entry of final judgment. The Supreme Court held that the entertainment of such a motion is within the discretion of the district court, which should consider unfair surprise or prejudice to the affected party and the policy of avoiding piecemeal appeals. 445 U.S. at 454.

Ruben argues that the district judge lacked jurisdiction to consider the attorneys' fee motions after Rathbun's appeal was dismissed, relying primarily on *Overnite Transp. Co. v. Chicago Indus. Tire Co.*, 697 F.2d 789 (7th Cir. 1983). There, a motion for attorneys' fees under 28 U.S.C. § 1927 filed eight months after dismissal and two months after affirmance was held to be untimely. The *Overnite* court did not, however, overrule or limit two earlier cases requiring the filing of such a motion only within a "reasonable" time and, if there is an appeal on the merits, before or during the pendency of the appeal. *Loctite Corp. v. Fel-Pro, Inc.*, 667 F.2d 577 (7th Cir. 1981); *Terket v. Lund*, 623 F.2d 29 (7th Cir. 1980).

The district judge properly rejected Ruben's reliance on *Overnite*. Unlike the appeal in *Overnite*, the appeal here was pending for only a brief time before it was dismissed due to inaction by Rathbun and her attorneys. *Cf. In re Itel Sec. Litig.*, 791 F.2d 672 (9th Cir. 1986) (attorney cannot destroy district court's jurisdiction to impose sanctions by withdrawing from case before appeal perfected or while appeal pending), *cert. denied sub nom. Bader v. Itel Corp.*, 107 S. Ct. 880 (1987). The district judge noted that the attorneys' fee motions should not have surprised Rathbun and her attorneys in light of the course of the discovery and trial proceedings. Finally, finding that the mo-

tions here were timely filed does not result in piecemeal appeals, since this is the only appeal perfected in this case. We are not asked to reconstruct a case previously reviewed in detail. There is no prejudice to Rathbun and Ruben because the litigation is not being renewed after an appeal on the merits that could have been consolidated with the appeals of the sanctions. *See Obin v. Dist. No. 9 of Intern. Ass'n of Machinists & Aerospace Workers,* 651 F.2d 574, 583-84 (8th Cir. 1981). Ruben's claimed failure to be apprised of the status of the appeal on the merits must be disregarded as his failure to be aware of the actions of Lester, his co-counsel. *See Shea v. Donohoe Constr. Co., Inc.,* 795 F.2d 1071, 1074 n.3 (D.C. Cir. 1986).

We also find support for holding the motions were timely filed in *Fulps v. City of Springfield, Tenn.,* 715 F.2d 1088 (6th Cir. 1983). Discussing both *White* and Obin, there we allowed a party to seek attorneys' fees eight months after the entry of judgment by the district court if the delay did not prejudice the opposing party, thus requiring an equitable bar on the ground of laches. *Id.* at 1095-96. While Ruben argues that he was prejudiced, the delay here was shorter than that allowed in *Fulps,* and Ruben does not show that he changed his position or detrimentally relied upon the delay in the filing of the motions.

Ruben also argues that *White* is inapplicable because the only statutory basis for an award of attorneys' fees against him is section 1927, whereas section 1988 was the relevant statute in *White.* We reject this argument. Ruben should have known that defendants, as the prevailing parties, could seek recovery of their attorneys' fees under

42 U.S.C. § 2000e-5(k), the language of which parallels section 1988 and therefore falls within the *White* rationale. To require a defendant to seek attorneys' fees from an attorney immediately after judgment, but allow additional time under *White* to seek recovery of attorneys' fees from a plaintiff, would only exacerbate the problem of piecemeal appeals.

As the Supreme Court noted in *White*, 455 U.S. at 454 & n.16 and 456 (Blackmun, J., concurring), the issue of timeliness of a motion for attorneys' fees can be avoided by the adoption of a local rule establishing a timeliness standard. We have previously encouraged the adoption of such local rules. *See Fulps, supra*, 715 F.2d at 1096. See Local Rule 17(n) of the Eastern District of Michigan.

III. STANDARDS FOR SANCTIONS

A. Standards for District Judges

The district judge recited four grounds in sanctioning plaintiff and her attorneys: (1) inherent power; (2) 28 U.S.C. § 1927; (3) Federal Rule of Civil Procedure 11; and (4) 42 U.S.C. § 2000e-5(k). An elaborate discussion of the standard for each of these grounds is not necessary. A good discussion of the first three grounds appears in *Oliveri v. Thompson*,[5] 803 F.2d 1265, 1271-75 (2d Cir. 1986), *cert. denied sub nom. County of Suffolk v. Graseck*, 107 S. Ct. 1373 (1987). *See generally* Johnson & Cassady, *Frivolous Lawsuits and Defensive Responses to Them*—

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[5]To the extent we disagree with the *Oliveri* court's "bad faith" requirement for sanctions under 28 U.S.C. § 1927, we discuss below the standard for such determinations in this circuit.

What Relief is Available?, 36 Ala. L. Rev. 927 (1985); Comment, *Courts Are No Place for Fun and Frivolty: A Warning to Vexatious Litigants and Over-Zealous Attorneys*, 20 Williamette L. Rev. 441 (1984).

As the *Oliveri* court noted, the different grounds for awarding sanctions and shifting attorneys' fees are distinct and require a close and careful analysis. Although the district judge mentioned the various grounds, it is just not clear which of the various grounds was the basis of the sanction against Rathbun and Ruben. We therefore consider each of the grounds advanced by the district judge and briefly set forth the differences between them.

1. "Bad Faith"

A district judge has inherent equitable power to award attorneys' fees for "bad faith" or frivolous conduct of a case. *See, e.g., Roadway Express, supra*, 447 U.S. at 765-67 (citing *Browning Debenture Holders' Committee v. DASA Corp.*, 560 F.2d 1078, 1088 (2d Cir. 1977)). This power extends to parties as well as attorneys. *Oliveri, supra*, 803 F.2d at 1272; *Jones v. Continental Corp.*, 789 F.2d 1225, 1229 (6th Cir. 1986). We have discussed the "bad faith" rule at length in *Shimman v. International Union of Operating Eng'rs, Local 18*, 744 F.2d 1226, 1228-30 & nn. 5, 6 (6th Cir. 1984) (collecting cases), *cert. denied*, 469 U.S. 1215 (1985).

There are only two aspects of the "bad faith" rule implicated by the district judge's opinion imposing sanctions here—"(1) bad faith occurring during the course of the litigation; [and] (2) bad faith in bringing[the] action or causing [the] action to be brought. . . ." *Shimman*, 744

F.2d at 1230. The district judge did not clearly delineate which of these two grounds supported the sanctions against Rathbun and Ruben, respectively. As we note below, however, the only plausible ground for a bad faith finding under the circumstances of this case must be found in the conduct of the litigation and not in bringing it.

2. 28 U.S.C. § 1927

Section 1927 of Title 28 provides for an award of attorneys' fees where an attorney "multiplies the proceedings in any case unreasonably and vexatiously. . . ." As explained in the legislative history of the 1980 amendment to section 1927, the section is designed as a sanction against dilatory litigation practices and is intended to require an attorney to satisfy personally the *excess* costs attributable to his misconduct. *See* H.R. Rep. No. 1234, 96th Cong., 2d Sess. 8, *reprinted in* 1980 U.S. Code Cong. & Ad. News 2781, 2782. *See generally* Annotation, *What Conduct Constitutes Multiplying Proceedings Unreasonably and Vexatiously so as to Warrant Imposition of Liability on Counsel Under 28 USCS § 1927 for Excess Costs, Expenses, and Attorney Fees,* 81 A.L.R. Fed. 36 (1987).

In *United States v. Ross,* 535 F.2d 346 (6th Cir. 1976), we initially defined "unreasonably and vexatiously" to mean "an intentional departure from proper conduct, or, at a minimum, . . . a reckless disregard of the duty owed by counsel to the court," *Id.* at 349. We stated in *Ross* that unintended, inadvertent, and negligent acts will not support an award under section 1927, *id.* at 349-50, even if significant costs are incurred by the court and opposing parties as a result thereof. As explained in *Colucci v.*

New York Times Co., 533 F. Supp. 1011, 1013-14 (S.D.N.Y. 1982), care must be taken in assessing attorneys' fees under section 1927 lest attorneys be deterred from their duty to "represent [a] client zealously. . . . *Model Code of Professional Responsibility* EC 7-1 (1980).

More recently, we have noted a relaxed standard applicable to section 1927 determinations. In *In Re: Jaques*, 761 F.2d 302 (6th Cir. 1985), *cert. denied*, 106 S. Ct. 1259 (1986), the majority opinion suggested that intent is no longer relevant to such determinations, *id.* at 306, although a majority of the panel could not agree on this rule. However, a similar concept was explicated in *Jones, supra*, as follows:

> 28 U.S.C. § 1927 authorizes a court to assess fees against an attorney for "unreasonable and vexatious" multiplication of litigation *despite the absence of any conscious impropriety.* An attorney's ethical obligation of zealous advocacy on behalf of his or her client does not amount to *carte blanche* to burden the federal courts by pursuing claims that are frivolous on the merits, or by pursuing nonfrivolous claims through the use of multiplicative litigation tactics that are harassing, dilatory, or otherwise "unreasonable and vexatious." Accordingly, at least when an attorney knows *or reasonably should know* that a claim pursued is frivolous, or that his or her litigation tactics will needlessly obstruct the litigation of nonfrivolous claims, a trial court does not err by assessing fees attributable to such actions against the attorney.

789 F.2d at 1230 (emphasis added). *Jones* makes clear that the standard for section 1927 determinations in this circuit is an *objective* one, entirely different from determinations under the bad faith rule. *See Haynie v. Ross Gear*

Div. of TRW, Inc., 799 F.2d 237, 243 (6th Cir. 1986), *cert. dismissed*, 107 S. Ct. 2475 (1987).

Nevertheless, we do not read these subsequent cases as overruling the thrust of *Ross*, to wit, that simple inadvertence or negligence that frustrates the trial judge will not support a sanction under section 1927. There must be some conduct on the part of the subject attorney that trial judges, applying the collective wisdom of their experience on the bench, could agree falls short of the obligations owed by a member of the bar to the court and which, as a result, causes additional expense to the opposing party. While this ideal may be difficult to implement, judges faced with motions under section 1927 should be mindful that their individual perturbations will not alone justify a sanction.

As we discuss below, section 1927 may support a sanction against Ruben for discrete acts of misconduct.

3. Federal Rule of Civil Procedure 11

Rule 11 was the basis of the unappealed sanction against Weiner and was again mentioned by the district judge in sanctioning Ruben. Rule 11, however, does not support the sanctions imposed in this case. Rule 11 is concerned with the signing of frivolous pleadings and other papers. *Oliveri, supra*, 803 F.2d at 1274. Because Ruben did not sign any of the pleadings or papers filed in the district court, Rule 11 simply cannot support the sanction against him. Although the language of Rule 11 also allows a sanction against a party, the district judge did not rely upon it in assessing the sanction against Rathbun.

4. 42 U.S.C. § 2000e-5(k)

In *Christiansburg, supra,* the Supreme Court described the test for awarding attorney's fees under 42 U.S.C. § 2000e-5(k) to a prevailing defendant in a Title VII case. The Supreme Court stated: "In sum, a district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." 434 U.S. at 421. As will be described, we conclude that this standard does not support an award of attorneys' fees against Rathbun.

B. Standard of Review

The standard for our review is whether the district judge abused his discretion in awarding attorneys' fees. *E.g. Jones, supra,* 789 F.2d at 1227, 1233; *Smith v. Smythe-Cramer Co.,* 754 F.2d 180, 185 (6th Cir.), *cert. denied,* 473 U.S. 906 (1985); *Tarter v. Raybuck,* 742 F.2d 977, 986 (6th Cir. 1984), *cert. denied,* 470 U.S. 1051 (1985). We must review the record to determine whether it will support the district judge's factual findings. *See Jones,* 789 F.2d at 1230-31; *Smith,* 754 F.2d at 185; *Tarter,* 742 F.2d at 986.

Rathbun accepts the "abuse of discretion" standard. On the other hand, Ruben conclusorily argues for a *de novo* review of the district judge's conclusion, relying on *Zaldivar v. City of Los Angeles,* 780 F.2d 823, 828 (9th Cir. 1986). *Zaldivar* was a Rule 11 case, which, as we have noted, does not apply to Ruben. Further, the *Zaldivar* court itself noted in a subsequent case that the standard for review of sanctions premised on bad faith and frivol-

ousness is "abuse of discretion." *Mitchell v. Office of Los Angeles County Sup't of Schools,* 805 F.2d 844, 846 (9th Cir. 1986) (citing *Jones v. Giles,* 741 F.2d 245, 250 (9th Cir. 1984)).

IV. THE SANCTION AGAINST RATHBUN

A. Attorneys' Fees

The imposition of attorneys' fees against Rathbun must be reversed if only because she never had an adequate opportunity for a hearing on the record. *Roadway Express, supra,* 447 U.S. at 767. While briefs were filed on Rathbun's behalf, she was clearly abandoned by her attorneys at the hearing itself. This points out an inherent problem in a sanction hearing addressed to both a plaintiff and her attorneys, where the plaintiff and attorneys are not separately represented. *See Michigan Nat'l Bank v. Kroger Co.,* 619 F. Supp. 1149, 1162 (E.D. Mich. 1985). In this case, although Rathbun's attorneys advanced no arguments for her at the hearing, at least their positions were essentially similar, to wit, that the litigation was factually justified. The attorneys did not attempt to blame plaintiff; instead, Lester graciously tried to accept all responsibility for any problems with the case. Thus, while we express no opinion on the exact circumstances in which a party should be represented separately from her attorneys upon the consideration of sanctions, we nevertheless note that this a problem to which district judges should be alert.

1. Bad Faith

Even if Rathbun had been represented at the sanction hearing, she simply cannot be sanctioned under the circum-

stances here for bad faith either in the filing of the case or its prosecution.

a. Institution of the Action

Rathbun testified at trial about the use of derogatory language toward her based on her sex and national origin that she made known to her superiors and the school board. She described two attacks on her, one sexual. There was various testimony that Rathbun's superiors considered certain work that she was capable of doing "man's work." There was evidence that went toward the issue of retaliatory transfer, even if it was legally insufficient. While Rathbun's attorneys did not do a good job of presenting testimony from witnesses favorable to her, neither did the basis for her case rest entirely on her own testimony.

The school board defendants concede that the OCRC's finding of probable cause is some evidence justifying Rathbun's case, but they argue that the findings should be given little weight. *See Bowers v. Kraft Foods Corp.*, 606 F.2d 816, 818 (8th Cir. 1979). The district judge's sanction opinion did not even consider the fact that the OCRC had issued a probable cause finding against the school board that implicated some of the non-school board defendants.[6]

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[6]As to the school board defendants, the initial complaint as well as the amended complaints clearly established (contrary to the district judge's statements) that they were joined only in their representative capacity. Thus, it is not clear why they thought it necessary to retain separate counsel. The papers in the appendix are ambiguous on this point. The record reflects that Rathbun moved to default the individual board members in January of 1983. This could not have been the motivat-

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The probable cause finding of the OCRC, though not dispositive, lends support for Rathbun's belief that she had a legal claim of discrimination and did not pursue her action in bad faith. *See Mitchell, supra,* 805 F.2d at 847 (reversing an award of attorneys' fees to defendants on grounds of bad faith and frivolousness following Rule 41(b) dismissal of Title VII action where EEOC had issued probable cause determination); *Badillo v. Central Steel & Wire Co.,* 717 F.2d 1160, 1165 (7th Cir. 1983) (upholding denial of an award of attorneys' fees to prevailing defendant in Title VII case where plaintiff put misplaced reliance on EEOC probable cause determination); *see also Bowers, supra* (reversing an award of attorneys' fees to defendants on grounds of frivolousness where EEOC had issued right-to-sue letter).

Rathbun was not completely unjustified in believing she was the subject of discrimination and a sexually harassing and abusive work environment. There is no evidence that Rathbun knew that the individual school board members (even assuming she did sue them in their individual capacity) could not be held liable for acts of discrimination, whether she informed them of the acts or not. *See Jones, supra* (abuse of discretion to award attorneys' fees under

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ing factor behind their retaining separate counsel, however, since they had already retained separate counsel by September of 1982, when the record suggests they were at risk only in their representative capacity. A motion could have resolved this ambiguity and, perhaps, avoided the need for two attorneys to represent defendants throughout this lengthy litigation. While there may, at times, be reasons why defendants do not make dispositive motions, *see Kroger, supra,* 619 F. Supp. at 1154, we can conceive of no legitimate reason why this particular issue was not addressed forthrightly early in the case.

section 1988 or inherent power in race discrimination case in which employee failed to communicate alleged mistreatment to employer and joined individual defendants as "agents" of employer); *cf. Turner, supra,* 742 F.2d at 987.88 (abuse of discretion to award attorneys' fees under section 1988 where only parts of plaintiff's case without merit). Combining the OCRC finding with Rathbun's testimony and her attorneys' advice, it was clearly erroneous to find that Rathbun brought her discrimination claim in bad faith. *See Haynie, supra,* 799 F.2d at 242.

b. Conduct of the Litigation

As for possible bad faith by Rathbun in the *conduct* of the litigation, there is simply no evidence in the record suggesting that she acted in bad faith or contributed in any way to the manner in which this case was handled. If there was any fault in this regard, it lay with the attorneys and she should not be penalized for their misdeeds, if any. *Cf. Shea, supra* (sins of attorneys should not be visited upon plaintiff where attendant costs to defendants can be remedied by assessing defendants' attorneys' fees against Plaintiff's attorneys, especially where judge has not previously warned plaintiff of derelictions of her attorneys); *Carter v. City of Memphis, Tenn.,* 636 F.2d 159 (6th Cir. 1980) (per curiam) (expressing same concept).

2. Frivolousness Under *Christiansburg*

The individual school board members point out that, as to them, there was no probable cause finding. Less weight may be given to Rathbun's reliance on an administrative finding of probable cause since she included in her action

claims against defendants not considered by the OCRC. *See Badillo*, 717 F.2d at 1164.

The Supreme Court in *Christiansburg* illuminated the standard it announced with the following pertinent language:

> In applying these criteria, it is important that a district court resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a a prospective plaintiff be sure of ultimate success. No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation. Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit.

434 U.S. at 421-22.

As discussed above, here there is no evidence that Rathbun was aware that the individual school board members—again, assuming she sued them in their individual capacity, an assumption on which the district judge proceeded—could not be held legally responsible for conduct of her fellow employees. She had some foundation for believing that she had been discriminated against either on the basis of her sex or French origin. Combined with the advice of her original attorneys that she had a claim against the individual school board members and the subsequent encouragement by an attorney and law professor to pur-

sue these claims further, Rathbun certainly had a sufficient basis for continuing her claims against the individual defendants. *See Badillo, supra,* 717 F.2d at 1165; *see also Smith, supra.* 754 F.2d at 185 (abuse of discretion to impose sanction under section 1988 in race discrimination case where couple had some reason to believe they had been discriminated against in housing). The adding of some meritless claims does not make the whole case frivolous. *See Haynie, supra,* 799 F.2d at 242; *Tarter, supra,* 742 F.2d at 987-88; *Badillo,* 717 F.2d at 1164. Under the circumstances, a sanction against Rathbun under the *Christiansburg* standard was improper.

B. Costs

While the district judge had discretion not to tax costs against Rathbun, his doing so was not clearly an abuse of discretion since Rathbun's case lacked merit. *See Jones, supra,* 789 F.2d at 1233. However, under the circumstances, the issue of costs must be remanded for a determination of whether Rathbun is capable of paying the rather sizeable costs claimed by defendants (over $3,000). *See Badilla, supra,* 717 *F.*2d at 1165. For example, in *Hill v. BASF Wyandotte Corp.,* 547 F.Supp. 348, 355-56 (E.D. Mich. 1982), the trial judge awarded $3,000 in attorney fees in an employment discrimination case, but there was evidence in that case showing plaintiff's income to be $24,610. *See also Piljan v. Michigan Dep't of Social Services,* 585 F.Supp. 1579, 1583 (E.D. Mich. 1984) (awarding $3,000 in attorney fees as appropriate to deter frivolous Title VII claims). Ordinarily, while an assessment of *costs* will not be reversed on the basis of indigency, district judges are encouraged to consider the question of indigency

fully for the record. *Jones, id.* Although Rathbun raises the indigency issue for the first time on this appeal, because of the manner in which she was denied the opportunity to present her position at the hearing before the district judge, he should consider her indigency claim on remand. *See Haynie, supra,* 799 F.2d at 243 (remanding for indigency determination as to fees and costs).

V. THE SANCTION AGAINST RUBEN

Since Rathbun's case was instituted and prosecuted by several attorneys before Ruben entered an appearance, he cannot be sanctioned for "bad faith in bringing an action or causing an action to be brought." *Shimman, supra.*

The probable cause finding of the OCRC also precludes a finding that Ruben *entered* the action in bad faith. While the district judge ultimately discredited Rathbun's testimony, this alone is not a sufficient basis for sanctioning her attorneys on grounds of bad faith where no evidence clearly contradicted their client's statements at the time the attorney undertook representation. *See Oliveri, supra,* 803 F.2d at 1277-78. To the contrary, Rathbun's statements were corroborated by the OCRC's finding that other evidence supported a discrimination action. Ruben, like Rathbun, was justified in relying on this fact.

The real issue is whether Ruben *continued* to pursue the case in bad faith after some discrete moment in its history. *See Christiansburg,* 434 U.S. at 422. A determination of whether the sanction against Ruben was appropriate depends, then, on the paper trail in the district court and the extent of Ruben's involvement in the alleged misconduct of Rathbun's attorneys. *See Shimman, supra.*

A. Bad Faith in Continuing the Case Against the Individual Defendants

Soon after the case was filed, all defendants except Haas, Hudock and Bernie Wilson[7] moved to dismiss for lack of subject matter jurisdiction on the ground that the complaint indicated on its face that Rathbun filed her action one day after the statutory ninety-day period. Rathbun subsequently amended the complaint twice, establishing that she filed within ninety days of receipt of the right-to-sue letter. The school board members later moved for summary judgment on the ground that they were not "employers" under Title VII and that the district court lacked jurisdiction over them because Rathbun failed to name them in the EEOC charge. These motions were denied in January of 1983. Bernie Wilson was subsequently dismissed because of his death. Defendants Pegues, Berarducci, and Nicholas Angelo also moved for summary judgment on the ground that they were not named in the EEOC charge. Pegues and Berarducci were granted summary judgment on this ground in June of 1984, twenty days before trial. Nicholas Angelo was mentioned in the EEOC charge and, thus, was not granted summary judgment.

Ruben argues that denial of the above motions precluded the district judge from later imposing a sanction, since the denials gave him reason to believe that the case had merit. *See Jones, supra,* 789 F.2d at 1231 n.4 (suggesting sanction precluded where district court failed to grant individual employees' motion to dismiss on legal

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[7]The record does not reflect any participation in the litigation by these three defendants until after Rathbun moved in January of 1983 for a default judgment against them. Their subsequent motions to file answers were granted.

grounds). The school board members, however, continue to argue on appeal that there was no legal justification for naming them as defendants. They argue that under Ohio law they were not Rathbun's "employers" so as to create liability under Title VII. They also reassert that they were not named in the EEOC charge.

The denial of the motions for summary judgment precludes a sanction on the ground that the claims against them were *legally* insufficient. Where a complaint contains "glaring legal deficiencies," the deficiencies and any ambiguities can be so easily resolved by motion that it is not unduly burdensome to defend. *See Jones, supra,* 789 F.2d at 1231-32. A sanction is generally improper where a successful motion could have avoided any additional legal expenses by defendants. *Oliveri, supra,* 803 F.2d at 1280; *Obin, supra,* 651 F.2d at 588 & n.15; *Browning, supra,* 560 F.2d at 1088. Such motions were filed and denied.[8] To the extent defendants now argue Rathbun included legally groundless claims of mental anguish, emotional distress, and medical treatment, their failure to promptly file a motion to dismiss these prayers for relief

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[8]This appeal does not address the correctness of the denial of defendants' motions, but only the imposition of the sanctions. (Three district judges presided over this case at various times. The bulk of the dispositive motions mentioned above were perfunctorily decided on two days in late January of 1983 by the second judge involved with the case, before the case was reassigned to the judge who presided over the trial and fee motions that are the subject of this appeal.) Thus, we must accept as correct the district court's refusal to dismiss most of the defendants on *legal* grounds. While Pegues and Berarducci were dismissed on legal grounds, the district judge's sanction opinion does not differentiate them from Rathbun's joining other individual defendants whose motions were denied.

precludes a determination that Ruben acted in bad faith in joining the prosecution of the complaint as a whole.

Since none of the above motions was predicated on the underlying facts, the denial of the motions did not preclude the district judge from imposing sanctions if the case was *factually* frivolous. The order imposing sanctions makes it clear, in fact, that it was not the *legal* insufficiency of the complaint that led to the sanctions but the lack of *factual* support for the case. We have, however, already rejected a factual predicate for sanctioning Ruben.

B. Bad Faith Misconduct in the Course of the Litigation

The only possible rationale for finding "bad faith" by Ruben lies in his conduct during the course of the litigation. The record shows that Ruben's involvement was more significant than he admits. Ruben revised a brief in opposition to a motion, and he attended a pretrial conference, a discovery meeting, Rathbun's deposition (the only one taken), and the opening day of trial. Although Ruben claims he served without compensation, in a telephone call to one of defendants' lawyers it was represented that Rathbun had retained Ruben at a rate of $150 an hour. Ruben wrote a letter to defendants' attorneys asking he be served with copies of all pleadings, although it appears that, with one exception, none was sent him. This involvement was not insignificant, especially considering the apparently minimal preparation put forth by Lester. We find reasonable the district judge's conclusion that, given the differing levels of experience between Lester and Ruben, Ruben played an influential role in the case.

In March of 1982, Lester sent to James Ries, the assistant city law director originally defending the case, a letter threatening a burdensome deposition schedule if defendants did not settle. The offer was refused, yet no one was deposed. (In fact, other than some interrogatories, Rathbun's attorneys conducted no discovery.) The district judge relied on this fact in levying the sanctions.[9] Ruben relies on Lester's assertion at the sanction hearing that Ries encouraged him (Lester) to file a settlement offer that compared the expected costs of litigation if the case went to trial. Ruben also argues that he was not involved in the sending of the threatening letter and that, in any case, there is no showing it in any way multiplied the proceedings or prejudiced defendants.

A second event also figuring prominently in the district judge's imposition of sanctions was a motion filed by Weiner on Lester's behalf to disqualify defendants' attorneys on the mistaken grounds of conflict of interest.[10] A discrete sanction had already been levied against Weiner for the filing of the motion. Ruben argues that the motion was filed in a good faith mistaken belief of the facts. Second, he argues that, although the motion itself was not withdrawn, the motion was promptly "rectified" by Rathbun's reply brief on the motion, which removed the name of one of defendant's attorneys. Third, Ruben argues that

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[9]Combined with other "bad faith" tactics, a threat of numerous depositions may be the basis of a bad faith award against an attorney. *See Browning, supra,* 560 F.2d at 1089.

[10]A groundless motion to disqualify opposing counsel may support a sanction under 28 U.S.C. § 1927. *See Wold v. Minerals Eng'g Co.,* 575 F.Supp. 166 (D.Colo. 1983).

there was, in fact, a conflict. This last argument is contradicted by Weiner's concession at the sanction hearing that there was no factual foundation for the motion. Fourth, despite evidence that Ruben participated in the filing of the motion, he argues that his input was minimal and strictly academic.

Many, if not most, of the problems that arose in the case are attributable to inadequate pretrial conduct by Rathbun's attorneys. Discovery by Rathbun was almost nil. Lester and Ruben failed to file a trial brief and list of exhibits and witnesses before trial.[11] On the first day of trial, they were granted leave to file their papers the following day, which they did. The district judge recited these facts as evidence of bad faith and the cause of additional expense to defendants, although he did not state specifically what effect the delay had on defendants. Ruben argues that there was no prejudice to defendants in the one-day delay in filing the trial materials.[12] In seeking

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[11]Proceeding to trial upon inadequate evidence may lead to a sanction under 28 U.S.C. § 1927. *See Lewis v. Brown & Root, Inc.*, 722 F.2d 209 (5th Cir.), *cert. denied*, 467 U.S. 1231 (1984). However, while an attorney may be sanctioned for not acquiring facts necessary to rebut his good faith belief that the case warranted prosecution, inadequate pretrial preparation by itself (contrary to the district judge's suggestion) cannot justify a conclusion that Ruben pursued the case in bad faith. *See Fisher v. Fashion Institute of Technology*, 491 F.Supp. 879, 890 (S.D.N.Y. 1980).

[12]As an attorney of record, Ruben could be held accountable for failure to take discovery or comply with pretrial orders. *See Jones, supra*, 789 F.2d at 1232; *Lipsig v. National Student Mktg. Corp.*, 663 F.2d 178 (D.C. Cir.1980). However, we think that the district judge's willingness to accept the trial materials one day later, without imposing a sanction at the time, pre-

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to uphold the sanctions, defendants also point out that Lester and Ruben were late the first day of trial and failed to have enough witnesses present on the third day of trial to occupy the day. Ruben also failed to appear at trial after the first day. The district judge recited this as further evidence of his unprofessionalism.[13] Ruben argues in response that he did not appear after the first day because his role was ancillary and there was no need for him to be there.

As we have noted, the basis for the district judge's sanction against Ruben is not clearly delineated. The district judge apparently sanctioned Ruben under his inherent powers, rather than 28 U.S.C. § 1927, because he considered the cumulative nature of the facts to constitute gross unprofessional conduct for an attorney of record.

(Continued from previous page)

cluded him from later sanctioning Ruben for this delinquency. *Cf. Potlatch v. United States,* 679 F.2d 153 (9th Cir. 1982) (district court abused discretion in excluding documentary and witness evidence because of late filing, where party complied as well as possible, no intent not to comply with court's deadline, no prejudice to opposing party, and court expressed willingness to generally extend discovery deadlines and accept late filing if certain condition satisfied); *Vac-Air, Inc. v. John Mohr & Sons, Inc.,* 471 F.2d 231 (7th Cir. 1973) (while not condoning attorney's failures, including failure to timely answer interrogatories court reversed sanction of default where interrogatories were answered shortly after due and attorney had already paid fine for conduct that was partial basis for default).

[13]While failure to appear for trial may, in a proper case, result in a sanction under 28 U.S.C. § 1927, *see In Re: Jacques, supra; see also Coston v. Detroit Edison Co.,* 789 F.2d 377 (6th Cir. 1986), non-appearance for a court proceeding does not appear to be punishable where co-counsel is present in lieu of the subject attorney. *See United States v. Delahanty,* 488 F.2d 396, 399-400 (6th Cir. 1973).

Ruben argues that because he did not control the litigation, it was improper to sanction him.[14] While Ruben's ancillary role could not entirely protect him, it would perhaps have been better for the district judge to advise him to either withdraw from the case or take over its management when it first became apparent that the case had severe problems.

That portion of the sanction attributable to Ruben's alleged misconduct must be reconsidered by the district judge with more exacting scrutiny. A district judge should not await the aggregation of what he considers multiple acts of misconduct and then levy an aggregated sanction without at least warning the attorneys at the time of each act or reserving decision upon timely requests by opposing counsel. Discrete acts of vexatious conduct should be identified and a determination made whether they were done in bad faith or, even if bad faith was not present, whether they multiplied the proceedings pursuant to 28 U.S.C. § 1927. Because the district judge did not analyze the impact upon defendants of discrete acts of claimed misconduct, remand is necessary to allow the district judge to make such a determination. As the Court of Appeals for the Second Circuit noted in *Browning, supra:*

> [I]n an action not itself brought in bad faith, an award of attorneys' fees [against a plaintiff's attorney] should be limited to those expenses reasonably incurred to meet the other party's groundless, bad faith procedural moves. No attempt was made below to relate claimed expenses, costs, and fees to particular bad faith maneuvers. See *In re Boston & Provi-*

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[14]*See Conley v. KFC Corp.*, 622 F.Supp. 767 (W.D.Ky. 1985).

> *dence R.R. Corp.*, 501 F.2d 545, 550 (1st Cir. 1974). Accordingly, we remand for more specific findings as to those procedural motions or other actions, undertaken in bad faith, without justification or for an improper purpose, such as harassment or delay, and as to the expenses, costs, and attorneys' fees reasonably incurred by the opposing party or parties in meeting such improper motions, actions, or delays.

560 F.2d at 1089.

The extent to which Ruben's misfeasance, if any, caused defendants to incur additional expenses should be explored on remand.[15] While we endorse the view that sanction proceedings should not be allowed to bloom into protracted satellite litigation, *see Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1179 (D.C. Cir. 1985); Advisory Committee Notes to 1983 Amendment to Rule 11, 97 F.R.D. 198, 201 (1983), a district judge faced with a sanction motion must make certain findings in determining that an award is appropriate. Careful analysis and discrete findings are required, no matter how exasperating the case. The grounds for sanctions explored here are designed to improve the litigation process, but improvement cannot come at the expense of vigorous advocacy. District courts must strike a delicate balance between protecting the ad-

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[15]Ruben argues that the district judge improperly sanctioned him the same amount as Lester—for every alleged act of misconduct from the inception of Rathbun's case—even though he (Ruben) did not join the litigation until much later. Ruben also argues that he never received an affidavit of hours from one of defendants' attorneys. We need not address these claims since, on remand, both defense attorneys will be required to file affidavits setting forth with specificity the time they incurred defending against claimed vexatious acts by Ruben only.

versary system and not allowing attorneys to exploit the system for their own purposes.

For the foregoing reasons, we REVERSE the sanctions as to Rathbun and REMAND for proceedings not inconsistent with this opinion as to Rathbun's liability for defendants' costs and Ruben's liability under the district judge's inherent power of 28 U.S.C. § 1927. On remand, we contemplate that the district judge will require defendants' attorneys to amend their motions to identify the claimed misconduct by Ruben and the extra efforts required by them as a result. The district judge can then proceed to consider their motions anew.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JEANNE RATHBUN	)	CASE NO.
	)	C80-1914-Y
Plaintiff	)	
	)	JUDGE
v	)	SAM H. BELL
	)	
CITY OF WARREN BOARD OF EDUCATION, et al.	)	ORDER
	)	
	)	(Filed October
Defendant	)	22, 1985)

On October 16, 1980, the plaintiff Jeanne Rathbun filed the above-entitled action against her employer, the Warren City School District Board of Education. Also named as defendants were several members of the board of education and various employees of the school system all of whom were named in their individual capacity. On June 26, 1984, a four day trial to the court commenced, and at the conclusion of the plaintiff's evidence, the court granted all of the defendants' motions for dismissal pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. Thereafter, on July 6, 1984, the court issued formal Findings of Fact and Conclusions of Law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure. An appeal of this judgment was timely filed by the plaintiff. On September 24, 1984, the Sixth Circuit Court of Appeals dismissed the appeal for want of prosecution under Rule 18(d) of the Rules of the Sixth Circuit.

Presently before the court are two motions for an award of attorney fees. The first was filed by Craig Leister, counsel for the individual board members, and the second by Charles Richards, counsel for the Warren Board of Education and the employees of the school system. All of the defendants are seeking an award of fees from the plaintiff, and from three of the attorneys who represented her throughout these proceedings, Elliot Lester, Alan Miles Ruben and Keith Weiner. Mr. Lester and Mr. Weiner are attorneys presently engaged in the private practice of law, while Mr. Ruben is a professor at the Cleveland Marshall College of Law at Cleveland State University. Mr. Ruben's participation in the action, however, was in his capacity as a private attorney and not as a representative of the College of Law or Cleveland State University. All three men are admitted to the bar of the United States District Court for the Northern District of Ohio and are currently in good standing in that court.

On March 15, 1985, the court conducted a hearing on the defendants' motions for an award of attorney fees. At that hearing Mr. Ruben was represented by counsel while Mr. Weiner and Mr. Lester appeared on their own behalf. Presumably, all three men were continuing to represent the plaintiff since they have not withdrawn from representing her nor have they requested leave to do so. Singularly, it should be noted that no argument or briefs were advanced on *Mrs. Rathbun's* behalf by any of the attorneys. Instead, each of them advanced positions on behalf of themselves. After considering the record and the arguments by counsel, the court hereby grants the motions for attorney fees and enters its findings as follows.

I

The first issue to be addressed involves the jurisdiction of this court to determine an award of attorney fees at this stage of the proceedings. The defendants contend that they are entitled to an award of fees against both the plaintiff and her counsel under Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e *et seq.* (hereinafter Title VII). Specifically, they claim that fees should be awarded against plaintiff's counsel pursuant to the sanction provisions in Rule 11 of the Federal Rules of Civil Procedure, and through similar sanctions available under 18 U.S.C. § 1927. In addition, the defendants assert that jurisdiction for awarding fees against plaintiff's counsel is available by reason of the inherent power of a district court to sanction an attorney in a proper case.

Mr. Ruben and Mr. Weiner have argued that this court lacks subject matter jurisdiction over the attorney fee issue, inasmuch as the Sixth Circuit Court of Appeals had already dismissed the appeal for want of prosecution at the time the defendants filed their motions for attorney fees. It is counsel's position that once the court of appeals dismissed the appeal, this court lost all jurisdiction over the awarding of fees. In support of their jurisdiction contention, plaintiff's counsel rely upon the decision of the Seventh Circuit Court of Appeals in *Overnite Transp. Co. v. Chicago Indust. Tire Co.*, 697 F.2d 789 (7th Cir. 1983). The Seventh Circuit found that a district court did not have subject matter jurisdiction over a motion to award attorney fees under 28 U.S.C. § 1927, which was filed after the underlying action had been affirmed on appeal. In *Overnite,* the defendants' motion for attorney fees was

filed eight months after the original dismissal of the action by the trial court and nineteen days after the mandate was returned to the district court by the court of appeals which affirmed the judgment.

In holding that the filing of a motion for attorney fees after the underlying action was affirmed on appeal was unreasonable and outside of the district court's jurisdiction, the *Overnite* court found as follows:

> Moreover, if there has been no appeal of the court's decision on the merits of a case, a fair reading of *Terket* reveals that absent a specific statute or other rule, a motion for attorney's fees and costs must be filed with the district court within a "reasonable time" or as "expeditiously as possible," after a judgment on the merits is entered. In the instant case no motion requesting attorney's fees was filed with either the district court or this court during the pendency of Overnite's original appeal of the merits. It was not until two months after this court affirmed the district court's dismissal of the plaintiff's action that the defendant filed its motion for fees and costs. Therefore, since the defendant failed to file a motion before any court requesting attorney's fees while the appeal on the merits was pending, and because the district court did not reserve jurisdiction nor was jurisdiction expressly reserved by statute, we hold the defendant did not file its motion within a reasonable time. . . . (Footnotes omitted.)

Overnite Transp. Co. v. Chicago Indust. Tire Co., supra at 793, *citing Terket v. Lund,* 623 F.2d 29 (7th Cir. 1980).

Although the Supreme Court has never specifically addressed the issue of when a motion for attorney fees should be filed in an action arising under Title VII, that Court has discussed the time limitations for filing a fee application in civil rights actions pursuant to 42 U.S.C.

§ 1988. In *White v. New Hampshire Dept. of Empl. Sec.*, 455 U.S. 445 (1982), the prevailing party sought attorney fees four and one-half months after an appeal was dismissed and the parties had entered into a consent judgment. The Court, while reinstating the district court finding that the motion was timely filed, held that the time to file a motion for attorney fees is a reasonable time which is subject to the discretion of the district court, and that the trial court should deny a motion for fees which "unfairly surprises or prejudices the affected party." *Id.* at 454.

Applying the standards set forth above, this court now decides that all of the facts and circumstances surrounding the action must be considered to determine whether a motion for attorney fees has been timely filed and is thus within the jurisdiction of this court. To routinely find that all motions for attorney fees be filed prior to the termination of any appeal would contradict the finding in *White v. New Hampshire Dept. of Empl. Sec., supra.* Instead, the court must examine the record to ascertain whether the motion for attorney fees was filed in a reasonable time and does not unfairly surprise or prejudice the plaintiff and plaintiff's counsel.

In this action, the certified copy of the order of the Sixth Circuit dismissing the appeal was received and docketed by the clerk of the district court on October 19, 1984, approximately two months after the filing of the appeal. On October 30, 1984, the individual school board members represented by Mr. Leister filed their motion for attorney fees. The motion for fees filed by Mr. Richards on behalf of the school board and its employees was filed

on January 9, 1985. Under the facts and circumstances of this action, this court finds that both motions were filed in a timely and reasonable manner and do not unfairly surprise or prejudice the plaintiff or her counsel.

Unlike the appeal in *Overnite* which was pending for several months prior to resolution, the appeal in this action was pending but for a brief period of time. Further, the dismissal of the appeal was directly caused by the actions or inactions of the plaintiff and her counsel. It was incumbent upon the plaintiff to either prosecute the appeal or be subject to a dismissal for failure to comply with the appellate rules. It is not unreasonable for defense counsel to presume that the plaintiff will prosecute her appeal once it was filed, and therefore the defendants must be allowed some time to move for attorney fees. Thus, the court is unable to find any prejudice to the plaintiff or her counsel by permitting the filing of the motions for fees.

In addition, the court is unable to find that plaintiff or her counsel should have been unfairly surprised by the filing of these motions. The motions were filed within one month and three and one-half months respectively of the date upon which the appeal was dismissed in the Sixth Circuit. In light of the four and one-half months after dismissal of the appeal time period determined in *White v. New Hampshire Dept. of Empl. Sec., supra,* to have been reasonable, the defendants' actions in this case cannot be deemed to be unreasonable. Additionally, the plaintiff and her counsel at trial were made aware that fees could be sought by the defendants pursuant to the statements made by defense counsel during their motions under

Rule 41(b) of the Federal Rules of Civil Procedure. Further, they should have been aware, by reason of the defendants' repeated assertions throughout the trial proceedings, that defendant considered the action to be frivolous, unjustified in fact and law, and brought by the plaintiff and her counsel in bad faith. Hence, the court finds that the motions for awarding attorney fees were filed within a reasonable time frame and that it has jurisdiction to entertain the motions.

II

The first substantive issue to be addressed is that concerning the responsibility and liability of Mr. Weiner. The record reveals that at the time of his involvement in this action, Mr. Weiner had been a member of the bar of this state for a very short time. In his capacity as a duly licensed attorney, Weiner was employed as an associate in the firm of Lester & Associates and worked on this case on a limited basis under the supervision of Mr. Lester.

On January 5, 1983, plaintiff moved to disqualify all of the attorneys representing the various defendants. While this motion was admittedly prepared by Mr. Weiner while under the supervision and at the request of Mr. Lester, and only after consulting with Mr. Ruben on the legal issue raised therein, Mr. Weiner signed the motion. That pleading asserted that the various defense counsel had a conflict of interest because of their alleged multiple representation of defendants. Specifically, the plaintiff alleged as follows:

> In the case at bar there exists an *overwhelming blatant appearance of conflicting interests* between both the Defendant Board and the Board Member De-

> fendants and as such Defendant's counsel should not only be disqualified, but should have been alert to these conflicting interests and declined multiple representation of said Defendants. (Emphasis added.)

Plaintiff's Brief in Support of the Motion to Disqualify Counsel at page 3.

This statement is singularly inaccurate factually and plaintiff's counsel should have been aware of the inaccuracy at the time the motion was filed. The record and the pleadings submitted by the various defendants clearly delineate that the Warren Board of Education and its employees were being represented by Mr. Richards, while the individual board members were being represented by Mr. Leister. The alleged dual representation of defense counsel of both the Warren Board of Education and the individual board members had no factual basis whatsoever. The record reflects that these defendants were represented by separate counsel. Thus, factually, the alleged conflict in representation asserted by the plaintiff simply did not exist at the time the motion was filed. All counsel involved in this action should have been aware of the actual representation of each defendant by simply reviewing the pleadings in the record.

Rule 11 of the Federal Rules of Civil Procedure requires that every pleading, motion or other paper which is submitted to the court be signed by an attorney. In addition, the rule provides as follows:

> The signature of an attorney . . . constitutes a certification by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after *reasonable inquiry* it is *well grounded in fact* and is warranted

> by existing law or a good faith argument for the extension, modification, or reversal of existing law, and *that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of the litigation.* (Emphasis added.)

Further, the rule states that any attorney who violates the provisions of this rule *shall* be subject to an appropriate sanction, "which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee."

A motion for sanctions under Rule 11 should not be lightly made by a party or granted by a court. This court is very much aware of the serious effect the granting of a sanction may have upon a lawyer's professional record and reputation in the community. In determining the appropriateness of imposing any sanctions under Rule 11 against Mr. Weiner in this action, the court has reviewed with care the Advisory Committee Notes to the rule which states in pertinent part:

> The rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories. The court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted. Thus, what constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer; whether he had to rely on a client for information as to the facts underlying the pleading, motion, or other paper; whether the pleading, motion, or other paper was based on a plausible view of the law; or whether he

> depended on forwarding counsel or another member of the bar.

Applying this criteria to the conduct of counsel in this case, the court finds that sanctions should be imposed.

At the hearing on the motion for attorney fees and sanctions, the court addressed a direct inquiry to Mr. Weiner to determine the extent of his investigation into the underlying facts prior to his filing the motion in question. Mr. Weiner replied that he had done little investigation and, in fact, had never reviewed the pleadings in this action to ascertain which defendants were represented by Mr. Richards and which defendants were represented by Mr. Leister. Instead, Mr. Weiner stated that because the file in this matter was quite large and there were numerous defendants, the actual representation of the various defendants was confusing and unclear to him.

This careless approach to the filing of a serious and unjustified charge of professional misconduct and conflict of interest upon each member of defense counsel warrants the assessment of sanctions. The purpose of Rule 11 is to prevent and eventually end the filing of motions, pleadings, and other paper by counsel which are totally unfounded and not warranted by either the facts or the law. The motion which Mr. Weiner filed clearly comes under the rule. It further appears that the motion was filed with the sole purpose of disrupting the efforts of the defense attorneys to obtain discovery and bring this manner to trial. It is not the purpose of the rule to prevent or preclude the filing of motions predicated upon novel or unique legal theories or questions of fact. Instead, the purpose is to prevent a motion such as the one

filed by Mr. Weiner, a motion which was never researched in fact and was seemingly designed only to harass opposing counsel.

Mr. Weiner has asserted two separate theories for the proposition that sanctions are inappropriate against him. First he claims he was merely following the instructions of his supervisor Mr. Lester and advisor, Mr. Ruben, and second, he asserts that he was acting as an employee of Mr. Lester and would be protected by the doctrine of *respondeat superior*. Both of these arguments are totally without merit.

The fact that Mr. Lester and Mr. Ruben may have been involved in the preparation and filing of the motion to disqualify defense counsel does not alter Mr. Weiner's responsibility factually or legally. Mr. Weiner, was and is a licensed attorney. As such, he had and has a legal and professional responsibility under Rule 11 to abide by the rule's provisions which require that motions be filed after reasonable inquiry. When counsel pursues a motion "that a reasonably careful attorney would have known, after appropriate inquiry, to be unsound, the conduct is objectively unreasonable and vexatious." *In re TCI Ltd,* 769 F.2d 441, 445 (7th Cir. 1985). As an attorney, and as a professional who actively prepared the motion and *signed* the document, Mr. Weiner is fully accountable under Rule 11 for the filing of the motion. Although Mr. Lester asserts that he alone is responsible for the filing of unwarranted motions, his acceptance of responsibility does not alter the accountability of the attorney who actually certifies that the motion fulfills the standards required by Rule 11.

The assertion of the doctrine of *respondeat superior* as a defense to any sanctions under Rule 11 is without foundation in the law. The doctrine has no application to the actions taken by Mr. Weiner in this case. Rule 11 applies to the attorney who affixes his signature and thus certifies the document submitted to the court; it has no application to his employer. Though counsel may serve his business associates, his first and foremost duty is to the Law.

In determining the amount of the sanctions to be imposed under Rule 11 against Mr. Weiner, the court may consider all of the circumstances involved in this action including the experience and standing of counsel. *See: Huettig & Schromm v. Landscape Contractors Council*, 582 F.Supp. 1519, 1522 (N.D. Cal. 1984). Since Mr. Weiner's participation in this action was limited to the motion for disqualification and reply briefs to that motion, the court feels it just to assess only a sanction for the attorney fees which involved that motion. In considering a monetary sanction against Mr. Weiner, the court notes that he is a young attorney with a limited amount of experience, and that he relied to some extent upon the directions given by more experienced counsel, Mr. Lester and Mr. Ruben. Thus, it is the hope of this court that the sanction imposed against Mr. Weiner shall cause him in the future to consider the magnitude of his actions should he file a motion which is not well founded in fact or researched in the Law and also cause him to consider the professional responsibility he has to his client and to the other members of the bar and bench. Hence, this court orders that Mr. Weiner pay $350.00 as attorney fees to Mr. Richards and $150.00 as attorney fees to Mr. Leister on behalf of their respective clients as a sanction for violating Rule 11.

III

The next issue to be addressed by this court concerns whether the defendants are entitled to an award of attorney fees under Section 706(k) of Title VII, 42 U.S.C. § 2000e-5(k). The defendants contend that the plaintiff and her counsel pursued this action in bad faith even though they were aware that it was frivolous, unreasonable and without foundation in fact and law.

In *Christiansburg Garment Co. v. E.E.O.C.*, 434 U.S. 412 (1978), the Supreme Court discussed the awarding of attorney fees to a "prevailing party" under Title VII. The Supreme Court found that a prevailing plaintiff should normally be awarded attorney fees under the act, absent extraordinary circumstances. In reaching this conclusion, the Court examined the legislative history of Title VII, and noted that successful plaintiff is vindicating a policy established by the Congress in exposing unlawful employment discrimination. Thus, the Court concluded that Congress intended to provide remuneration for plaintiff's counsel to compensate them for their private role in enforcing the civil rights statutes by requiring the defendant-employer, which engages in discriminatory practices, to pay all of the costs including attorney fees of the action.

The *Christianburg Court* further stated that it was the legislative intent to provide additional protection to a defendant from unwarranted actions brought against him. This protection for defendants was the subject of the discussion which follows:

> The sparse legislative history of § 706(k) reveals a little more than the barest outlines of a proper accommodation of the competing considerations we have

> discussed. The only specific references to § 706(k) in the legislative debates indicates that the fee provision was included to "make it easier for a plaintiff of limited means to bring a meritorious suit." During the Senate floor discussions of the almost identical attorney's fees provision of Title II, however, several Senators explained that its allowance of awards to defendants would serve "to deter the bringing of lawsuits without foundation," "to discourage frivolous suits," and "to diminish the likelihood of unjustified suits being brought." If anything can be gleaned from these fragments of legislative history, it is that *while Congress wanted to clear the way for suits to be brought under the Act, it also wanted to protect defendants from burdensome litigation having no legal or factual basis.* (Emphasis added, footnotes omitted.)

Id. at 420.

Having found that Congress intended to provide some protections to prevailing defendants, the *Christiansburg* Court developed a standard which must be met in order to award attorney fees to a prevailing defendant. The Court stated,

> In sum, a district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case *upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.*
>
> In applying this criteria, it is important that a district court resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective

> plaintiff be sure of ultimate success. No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation. Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit. (Emphasis added.)

Id. at 421-422. Therefore, this court must determine whether the plaintiff's claim was "frivolous, unreasonable, or without foundation" at the outset of this litigation or "that the plaintiff continued to litigate after it clearly became so." *Id.* Further, should this court find that the instant action was either brought or continued in bad faith by the plaintiff or her counsel, "there will be an even stronger basis for charging him with the attorney's fees incurred by the defense." *Id.*

The Sixth Circuit Court of Appeals has recently discussed the *Christiansburg* standard for awarding attorney fees to a prevailing defendant in civil rights actions. In *Tarter v. Raybuck,* 742 F.2d 977 (6th Cir. 1984), the court reversed the district court's award of attorney's fees to a defendant since the underlying claim was not wholly meritless or without foundation. In *Tartar,* the issue before the district court involved a student's fourth amendment rights in the context of a physical search of the student by a school official. Although the district court found that the student had consented to the search, the consent issue "was reasonably in dispute given the context of the purported waiver of important constitutional rights. The exact nature and extent of a student's fourth amendment

rights are not well settled." *Id.* at 988. Thus, the circuit court held that a fee award would not be justified when a factual dispute exists and the plaintiff is asserting a cause of action predicated upon the violation of constitutional rights which are not well defined under the law.

The *Christiansburg* standards have also been applied recently by the Sixth Circuit to a fair housing action. In *Smith v. Smythe-Cramer Co.*, 754 F.2d 180 (6th Cir. 1985), the court stated:

> Application of these standards requires inquiry into the plaintiffs' basis for bringing suit. Awards to prevailing defendants will depend on the factual circumstances of each case. While a showing of bad faith is not required for an award of attorneys fees to a prevailing defendant, such a showing would justify an award of fees. Additionally, courts have awarded attorneys fees to prevailing defendants where no evidence supports the plaintiff's position or the defects in the suit are of such magnitude that the plaintiff's ultimate failure is clearly apparent from the beginning or at some significant point in the proceedings after which the plaintiff continues to litigate. As the Supreme Court emphasized in *Hughes*, however, the mere fact that allegations prove legally insufficient to require a trial does not, for that reason alone, render a complaint groundless under *Christiansburg*, 449 U.S. at 16, 101 S.Ct. at 179.

Id. at 183. The court further noted that awards of attorney fees have been properly granted to d[illegible]ndants when a plaintiff misuses the civil rights laws to collaterally challenge state judgments, *Tonti v. Petropoulous*, 656 F.2d 212, 215-16 (6th Cir. 1981), or when a plaintiff brings a claim which is clearly barred by unambiguous case law. *Werch v. City of Berlin*, 673 F.2d 192, 196 (7th Cir. 1982).

Unlike the novel legal issues presented to the trial court in *Tartar v. Raybuck, supra,* the legal issues advanced by the plaintiff in this action involve a settled area of the law. The plaintiff did not advance or even attempt to advance facts or theories which would serve to effectuate a change in existing law under Title VII; instead, she asserted that a cause of action of discrimination based upon sex and national origin factually existed under the standards for Title VII actions set forth in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). Therefore, any determination of whether the plaintiff's filing and prosecution of this action meets the standards for frivolous claims under *Christiansburg,* involves a review of factual circumstances surrounding the filing and prosecution of this case only in this manner may it be determined whether a good faith belief of a factual dispute existed.

Conjunctive to with this determination is a review of the involvement of plaintiff's counsel, Mr. Lester and Mr. Ruben. The defendants assert that both attorneys prosecuted this action in bad faith solely to extort a settlement from the school board. Further, it is asserted that plaintiff's counsel knew that the underlying claims and allegations made by the plaintiff were frivolous and totally without merit, but in spite of that knowledge continued to press this litigation in the hope that due to the threat of the expense of the litigation, some settlement could be forced upon the defendants.

In addition to the authority contained in Rule 11, a district court may assess attorney fees against an attorney who comes before it pursuant to 28 U.S.C. § 1927, which follows:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

This statute has been construed by the Supreme Court to permit the awarding of attorney fees against counsel in a civil rights action as sanction under limited circumstances.

In *Roadway Express, Inc. v. Piper,* 447 U.S. 752 (1980), the Supreme Court found that attorney fees could be assessed and awarded against a plaintiff's counsel under 28 U.S.C. § 1927 if counsel willfully abuses the judicial process. The Court stated:

> Of course, the general rule in federal courts is that a litigant cannot recover his counsel fees. See *Alyeska Pipeline Co. v. Wilderness Society,* 421 U.S. at 257. But that rule does not apply when the opposing party has acted in bad faith. In *Alyeska,* we acknowledged the "inherent power" of courts to "assess attorneys' fees for the 'willful disobedience of a court order . . . as part of the fine to be levied on the defendant [,] *Toledo Scale Co. v. Computing Scale Co.,* 261 U.S. 399, 426-428 (1923), '*Fleischmann Distilling Corp. v. Maier Brewing Co., supra,* at 718; or when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons. . . .' *F.D. Rich Co.* [*v. United States ex rel. Industrial Lumber Co.*], 417 U.S. [116], at 129 [(1974)] (citing *Vaughan v. Atkinson,* 369 U.S. 527 (1962)). *Id.,* at 258-259.
>
> The bad-faith exception for the award of attorney's fees is not restricted to cases where the action is filed in bad faith. " '[B]ad faith' may be found, not only

> in the actions that led to the lawsuit, but also in the conduct of the litigation." *Hall v. Cole,* 412 U.S. 1, 15 (1973). See *Browning Debenture Holders' Comm. v. DASA Corp.,* 560 F.2d 1078, 1088 (CA2 1977). This view coincides with the ruling in *Link, supra,* which approved judicial power to dismiss a case not because the substantive claim was without merit, but because the plaintiff failed to pursue the litigation.
>
> The power of a court over members of its bar is at least as great as its authority over litigants. If a court may tax counsel fees against a party who has litigated in bad faith, it certainly may assess those expenses against counsel who willfully abuse judicial processes. (Footnote omitted.)

Id. at 765-766. Under this test, the trial court may only award attorney fees if it makes a specific finding that plaintiff's counsel's conduct constituted or was tantamount to bad faith. See *In re TCI Ltd, supra,* at 445; *Dreiling v. Peugeot Motors of America, Inc.,* 768 F.2d 1159, 1165 (10th Cir. 1985); *United States v. Austin,* 749 F.2d 1407, 1408 (9th Cir. 1984); *Shimman v. International Union of Operating Engineers,* 744 F.2d 1226, 1230 (6th Cir. 1984). In this regard, the court must review the actions and conduct of both Mr. Lester and Mr. Ruben separately.

Mr. Lester first entered an appearance in this action on October 5, 1981 after original counsel obtained leave to withdraw. Mr. Ruben filed his notice of appearance as "additional counsel" on January 25, 1982. Thereafter, all court notices or orders were sent to both men by the clerk of courts. At all pretrials conducted in this matter before this court, one or both men attended on behalf of the plaintiff.

On March 15, 1982, Mr. Lester sent a letter to the defendants wherein he offered to settle this action for fifty-four thousand dollars. In this letter, counsel advised the defendants that their failure to accept this offer "will dramatically increase Mrs. Rathbun's legal fees and render settlement for fifty-four thousand "unrealistic." Specifically, counsel stated "[t]his office estimates that taking into consideration a fifteen day trial, seventeen or more depositions and various other costs, the total additional legal costs would be estimated at well over One-hundred Thousand Dollars." Contemporaneously, counsel informed the defendants that unless the settlement offer was accepted immediately, deposition subpoenas would be sent to 22 employees and officials of the Warren City School System. Many of these people were not parties to this action. These depositions were to take place in Cleveland, Ohio and would last an estimated "eight hours per day per person."

Upon receipt of this letter, the defendants did not agree to settle this litigation. In spite of defendant's position, the 22 employees and officials of the school system were never issued the subpoenas nor were any of them deposed as stated in the Letter of March 15. In fact, the only deposition ever conducted in this action was the deposition of the plaintiff which was taken by the defendants. The plaintiff did not undertake any depositions but instead elected to conduct discovery through the issuance of several sets of interrogatories to the various defendants.

On March 29, 1984, a trial notice was issued, setting this action for trial on June 26, 1984. Simultaneously,

this court issued an order regarding the preparation of counsel for trial, which order required counsel for all parties to submit to the court proposed witness Lists, and pre-marked exhibits two days prior to the trial. In addition, counsel was required to submit proposed findings of fact and conclusions of law and trial briefs. Although this order was sent to all counsel of record, only defense counsel complied with the court's order regarding pretrial submissions. Neither attorney for the plaintiff complied with the court's order or requested leave to comply prior to trial.

On the morning of trial, Mrs. Rathbun was represented by Mr. Lester and Mr. Ruben in the courtroom. The trial, however, was delayed because Mr. Lester was late in arriving to commence trial. Upon Mr. Lester's arrival, the proceedings were yet further delayed in order to ascertain the reasons for Mr. Lester and Professor Ruben's total failure to comply in any manner with the court's pretrial order of March 29, 1984. Thereafter, Mr. Lester requested and was granted leave to file all pretrial submissions by 9:00 A.M. on the next day. The trial of this matter then commenced with both Mr. Lester and Mr. Ruben in attendance. The sole witness called on the first day of trial was the plaintiff herself.

On June 27, 1984, Mr. Lester filed his pretrial submissions which included a witness list with twenty-one people named. Among the purported witnesses was a man who had recently undergone a serious heart operation and was under the advise of his physician to remain bedridden. Also named as a witness was a man who had died approximately eleven months prior to trial. State-

ment of the fact of his death was made part of the record in this action on September 12, 1983.

Mr. Ruben did not attend the trial proceedings after the first day. Prior to his absence the court was not informed that he would no longer participate in the trial proceedings, nor was his absence ever explained.

On the third day of trial, the plaintiff did not have sufficient witnesses to complete the day, even though counsel had been previously made aware of the court's daily schedule for trial and had been requested to schedule his witnesses accordingly. Until this time, Mr. Lester had called as witnesses Mrs. Rathbun, her husband, a friend of the plaintiff's and the defendant's representative at trial, Mr. Angelo. At this point Mr. Lester disclosed that none of the witnesses named on his list had yet been the subject of subpoena or even notified that they could possibly be called as witnesses. Counsel assured the court that he would personally have the subpoenas served that evening and that no further delays in the trial would occur. Mr. Lester explained that he and the plaintiff had limited financial resources and that he was, at this point in the proceedings, prosecuting the action on his own.

The next day, Mr. Lester called six witnesses who were the plaintiff's co-workers and who had been issued subpoenas the previous evening. Several of these witnesses testified that they knew nothing concerning the subject matter of this litigation, and all testified that they had very limited contact with the plaintiff. None of these witnesses had been deposed or even interviewed by plaintiff's counsel prior to testifying at trial. In fact, much

of the evidence presented through these witnesses and through earlier witnesses offered by the plaintiff contrasted sharply with the testimony offered by the plaintiff herself.

In essence, both of plaintiff's attorneys' preparation and performance at trial were less than professional, to say the least. Although the plaintiff brought this action against five individual school board members and several individual employees of the school systems, the record is totally devoid of any evidence involving these people. In fact most of the individual defendants' names, identities, employment or official positions were never mentioned by any witness including the plaintiff, nor do these defendants' names appear in any exhibit offered by the plaintiff. Instead, the record establishes only that these individual defendants had the misfortune of being so named and were therefore forced to defend this lawsuit. It is clear to the court that under the facts and circumstances found in the record, the filing and prosecution of this action against all of the individual defendants was a frivolous and unwarranted act as defined in *Christiansburg*. Further, this court can only reach one conclusion regarding the purpose of this filing and prosecution by the plaintiff and her counsel as it relates to the individual defendants. That conclusion is that the plaintiff, from the inception of this action and her counsel from the time they entered appearances in this case, acted with the intent to extract some monetary settlement from several individuals associated with the school system because of the threat of defending and expense of litigating this action, even though the plaintiff had no evidence either direct or circumstantial of any wrongdoing or liability

on the part of these individual defendants. The actions on the part of Mrs. Rathbun, Mr. Lester and Mr. Ruben of bringing and prosecuting unfounded charges of intentional discriminaton against the innocent individual defendants are totally contradictory to the legislative purpose of Title VII and the other civil rights laws of this country. Under such circumstances, as heretofore described, the court finds that the plaintiff, Mr. Lester and Mr. Ruben have all acted without requisite good faith by charging and prosecuting the individual defendants when they neither had nor produced a single thread of evidence against these defendants. Further, the testimony of the plaintiff herself clearly demonstrated that she had no evidence whatsoever which would indicate any discriminatory or unlawful action on the part of those individuals.

The court also finds that the action against the Warren Board of Education was brought by the plaintiff and prosecuted by Mr. Lester and Mr. Ruben in bad faith. In her pleadings, the plaintiff alleged that the actions of her employer against her were a result of unlawful discrimination in violation of Title VII. At trial, Mrs. Rathbun testified that she was denied overtime opportunities by the board of education and that she received burdensome work tasks and a retaliative transfer to another school. However, all of the relevant evidence offered by Mrs. Rathbun, including some of her testimony and that of the other witnesses which she offered, disputed and contradicted each and every claim.

The record reveals factually that Mrs. Rathbun did receive numerous overtime opportunities with the school

board. This was true even though she was at that time only a substitute employee of the school system, and was not entitled under school policy to work overtime unless all of the regular employees were first offered the overtime work. Further, the record reveals that Ms. Rathbun was actually aware that she was working as much or more overtime as her male co-workers, but wanted to work even more hours. The total lack of evidence of unconstitutional or discriminatory acts presented at trial by the plaintiff is grounds for awarding attorney fees against Mrs. Rathbun. *See Lewis v. Brown & Root, Inc.*, 711 F.2d 1287 (5th Cir. 1983) *cert denied* —U.S. —, 104 S. Ct. 2690, 81 L.Ed.2d 884 (1984).

Additionally, the record reveals that Mrs. Rathbun was transferred to an elementary school close to her home after an incident occurred between her and a male co-worker while she was employed at the high school. This incident involved a physical attack upon the plaintiff by the co-worker. Subsequent to this attack, the school board met to administer a severe discipline against the man. However, at the request of Mrs. Rathbun, no discipline was administered against the co-worker. There was no evidence offered by the plaintiff that her transfer after this incident was for a discriminatory reason. The sole evidence offered by the plaintiff demonstrated that the transfer was to alleviate the plaintiff's concerns about working with the men at the high school and to provide her employment closer to her home. Thus, the action against the Warren Board of Education was totally unsupported by any evidence of discriminatory conduct and must be considered to be frivolous, without foundation in fact, and lacking in good faith.

The actions of Mr. Lester and Mr. Ruben, as they concern the Warren Board of Education, must also be considered to be suspect. Both men knew or should have known that the prosecution of this action was warrantless. Therefore, counsel's actions can only be considered to have been conducted with an eye to compelling defendants to enter into a settlement so as to avoid the expense of litigation. The attorneys not only continued to prosecute this action, with knowledge of its merits, but engaged in a course of conduct which harassed the defendants and their counsel. First, Mr. Lester sent the "proposed settlement" letter of March 15, 1982 which offers the defendants the alternative of settling the action for fifty-four thousand dollars or face twenty-two imminent depositions, a fifteen day trial and one hundred thousand dollars in legal fees. When this proposal was rejected and the defendants commenced their own discovery requests, Mr. Lester instructed Mr. Weiner to file, under the guidance of Mr. Ruben, the previously mentioned motion to disqualify counsel. Finally, the approach taken by Mr. Lester and Mr. Ruben to the preparation for and conduct of the trial raises grave questions concerning their regard for their professional responsibility to fellow members of the bar and to the litigants who come before this court.

The activities of counsel previously described, together with the posture taken by plaintiff herself, present an unparalleled example of an abusive use of the system of justice in the civil rights area. Such an abuse of Title VII and conduct of counsel can not be tolerated by this court. Hence, this court shall award appropriate fees against each of the parties involved.

When making a determination of the attorney fee award, the court must consider the reasonableness of the hours expended and the reasonableness of the rate charged. *Hensley v. Eckerhart,* 461 U.S. 424 (1983). The Sixth Circuit has expressly set forth the guidelines for awarding attorney fees under 42 U.S.C. § 1988. In *Northcross v. Board of Ed. of Memphis City Schools,* 611 F.2d 624 (6th Cir. 1979), *cert. denied,* 447 U.S. 911 (1980), the court held that:

> [t]he district court should indicate on the record the number of hours it finds the plaintiffs' attorneys have expended on the case. This finding must first take into account the affidavits of counsel. The hours claimed need not be automatically accepted by the district court, but to the extent that hours are rejected, the court must indicate some reaon for its action, so that we may determine whether the court properly exercised its discretion or made an error of law in its conclusion. Hours may be cut for duplication, padding or frivolous claims.

Id. at 636. Although the *Northcross* decision involves a prevailing plaintiff under section 1983, this court must consider this guidance given by the circuit when awarding fees in this action. See also *Murphy v. International Union of Operating Engineers, Local 18,* — F.2d — (6th Cir. September 30, 1985).

IV

Both attorneys for the defendants have submitted the number of hours each expended in the defense of this action. Mr. Leister, the attorney for the individual school board members submitted his affidavit with supporting documentation that reveals that his clients were billed

$12,744.00 for attorney fees and $716.17 for costs actually incurred by counsel. In addition, Mr. Richards, the attorney for the Warren Board of Education and its employees, submitted his affidavit with supporting documentation that reveals that his clients were billed $30,797.50 for the defense of this action and $2,390.54 for costs incurred by counsel. It is not disputed that Mr. Richards undertook the lead role for the defense and thus devoted more billable hours to this case. Having reviewed the documents and the hours expended by counsel, the court finds that they are reasonable under the facts of this litigation and the length of the trial.

When determining a reasonable hourly rate, a court must examine "the fair market value of the services provided." *Northcross v. Board of Ed. of Memphis City Schools, supra* at 638. The fair market value would be the hourly rate charged by attorneys with similar "training, background, experience and skill" as the plaintiff's counsel. *Id.* In this action, the hourly rates charged by both Mr. Leister and Mr. Richards must be found to be reasonable after considering their respective backgrounds and their performance before this court. Mr. Leister charged between $65.00 and $55.00 per hour for all work performed while Mr. Richards charged $70.00 per hours. These rates are well within the rates charged by attorneys in the Northern District of Ohio and are thus found to be reasonable.

V

The final issue before this court involves the amount of the award to be assessed against Mr. Lester, Mr. Ruben and the plaintiff. In making the award against Mr. Lester, the court must consider his involvement in this action.

Much of the expense incurred by the defendants was a direct result of Mr. Lester's tactics prior to trial, his failure to comply with the court's pre-trial order, and his failure to provide a timely examination of witnesses at trial. Hence the court in its discretion awards Mr. Leister $2,500.00 and Mr. Richards $2,500.00 on behalf of their client against Mr. Lester as a sanction for prosecuting this action in bad faith.

The awarding of fees against Mr. Ruben requires more explanation. Mr. Ruben asserts that he was acting only as the advisor or teacher to Mr. Lester, and when applicable, Mr. Weiner. Further, he contends, that he was not an active participant in these proceedings but was merely assisting a friend and former student. Thus, Mr. Ruben attempts to avoid any responsibility for this action by placing blame and responsibility upon Mr. Lester. However, the record in this action will not permit Mr. Ruben to escape responsibility so conveniently by accusing his co-counsel.

That record reveals that Mr. Ruben was in fact an active participant in these proceedings from the date he entered an appearance in this case through the trial. He attended pretrials conducted by this court as a repesentative of the plaintiff. In addition, he appeared at trial as plaintiff's counsel and in that capacity is fully responsible for the failure of the plaintiff to comply with the court's pretrial order or obtain witnesses for trial.

In essence Mr. Ruben appears to have wanted to have participated in any possible success in this case or settlement that may have been extracted from the defendants. However, he also appears now to avoid any responsibility

by claiming total ignorance of the facts of the case and the manner in which it was prosecuted. It should be noted that Mr. Ruben is not a newcomer to this bar, but instead has practiced for many years and enjoys the reputation associated with his employment at a fine institution. As an experienced member of the bar, he must surely be charged with the knowledge and the responsibility that counsel of record undertakes when he accepts the position of representing a party in a lawsuit in the federal courts. To state that he was unaware of the frivolous nature of the plaintiff's underlying claims and the harassment of opposing counsel is simply not credible. Hence, this court also awards Mr. Leister $2,500.00 and Mr. Richards $2,500.00 on behalf of their respective clients against Mr. Ruben as a sanction for his participation in the course of conduct pursued by plaintiff.

The balance of the fees incurred by the defense counsel should be recovered from the plaintiff herself pursuant to Section 706(k) of Title VII, 42 U.S.C. § 2000e-5(k). The ultimate responsibility for the filing and prosecution of this case must be placed upon her because she knew from the inception of this action that it was frivolous and without any foundation in fact.

The record reveals that the plaintiff voluntarily went on a medical leave from her employment with the Warren Board of Education in order to return to her native France. During the years that followed this leave, the school system made numerous requests or offers of different comparable positions in the hope that she would return to work. At no time, however, did the plaintiff ever accept a position or return to work from her medical leave. At the plaintiffs' election, she chose to remain in

France and not return to work. Nowhere in the record does it show that she was treated in a discriminatory manner. This fact is relevant since at trial the damage sought by the plaintiff was her lost wages and her 'right' to reinstatement at her previous position. However, all of this relief was always available to her by merely working. Instead, she chose not to work.

The plaintiff was treated compassionately and fairly and was never discriminated against by her employer. In fact, many of the people who helped her gain the position originally and who later accommodated her desire to work overtime even though she was not eligible for the work as a temporary employee were "rewarded" for their assistance by being named as defendants in this action. Under these conditions, the court has no hesitation in holding that she acted in bad faith in filing this action, and is therefore fully accountable for the balance of the fees incurred by the defendants.

In summary, the court finds that the fees and costs incurred by Mr. Leister's and Mr. Richard's clients shall be the responsibility of the plaintiff and her counsel. Mr. Leister's fees and costs are awarded as follows:

Mr. Weiner	$ 150.00
Mr. Lester	2,500.00
Mr. Ruben	2,500.00
Mrs. Rathbun	8,321.17
	$ 13,471.00

Mr. Richard's fees and costs are awarded as follows:

Mr. Weiner	$ 350.00
Mr. Lester	2,500.00
Mr. Ruben	2,500.00
Mrs. Rathbun	27,838.04
	$ 33,188.04

It is regrettable when circumstances conspire to necessitate an opinion such as this. The court's ruling impacts financially upon the plaintiff; it also impacts both financially and ethically upon counsel. But this court, as others, serves the whole of our society, not one claimant or one profession.

Adherence to the principles of law set forth above and commitment to principles of fundamental fairness require such a ruling if only for the purpose of protecting innocent future defendants from the same type of unwarranted prosecution.

Accordingly, the defendants' motion for awarding attorney fees is hereby granted as set forth in this opinion.

IT IS SO ORDERED.

/s/ Sam H. Bell
SAM H. BELL
U. S. DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JEANNE RATHBUN Plaintiff -v- WARREN BOARD OF EDUCATION, et al. Defendant	CASE NO. C80-1914-Y JUDGE SAM H. BELL FINDINGS OF FACT AND CONCLUSIONS OF LAW

STATEMENT OF THE CASE

(Filed July 6, 1984)

This action was filed on October 16, 1980 by plaintiff, Jeanne Rathburn against the Warren City School District Board of Education and several of its employees and board members. Jurisdiction of this court was invoked pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.*

In brief, Mrs. Rathbun charged that while she was working for the Warren school system as a janitor she was denied the same opportunities as her male co-workers because of her sex and national origin. Mrs. Rathbun is a naturalized citizen of French ancestry.

On the basis of these contentions, a trial of this cause was begun on June 26, 1984, continuing for four days thereafter. At the conclusion of the plaintiff's case, the court as trier of the facts rendered judgment against the plain-

tiff and in favor of all of the defendants in accordance with Rule 41(b) of the Federal Rules of Civil Procedure.

The evidence adduced by plaintiff consisted of her own testimony, the testimony obtained as if on cross examination of certain named defendants, and witnesses who had been associated with Mrs. Rathbun during her years of employment for the Warren City School District. This fact is mentioned because the testimony given by members of the "fellow employee" group contrasted sharply with that offered by plaintiff herself. Inasmuch as such testimony was offered by plaintiff, a relatively unusual problem was faced by the court in its determination relative to whether plaintiff had established a prima facie case at the conclusion of her case in chief.

Mrs. Rathbun gave evidence of a litany of associated ills suffered by her at the hands of various defendants during her years of active employment. In sum, her allegations of disparate treatment centered on four delineated areas.

1. Denied the ability to earn overtime monies.

2. A suffering of verbal and physical abuse and intimidation from certain of her coworkers.

3. Retaliative transfers within the school system.

4. The assignment to her of burdensome work tasks.

Concerning these allegations, the court has considered the evidence, both testimonial and otherwise evidential and pursuant to Rule 52 of the Federal Rules of Civil Procedure enters its Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Mrs. Rathbun started working for the Warren City School District in 1973 as a substitute janitor; however, she worked on a regular basis at East Jr. High School. In 1974, the plaintiff was transferred to Warren G. Harding High School (hereinafter Harding) where she was assigned to work on the second floor. While at Harding, Mrs. Rathbun passed a civil service examination and on October 6, 1975 became a regular full-time employee of the school system and was thereafter protected by Ohio Civil Service Laws as a non-certified classified employee. During this period Mrs. Rathbun was the only woman janitor employed at Harding. However, women were employed as janitors in the other buildings in the school system.

At Harding, janitors were assigned overtime by the custodian in charge of the building, William Haas. Mr. Haas would assign the overtime work to the janitor whose work station was located where the overtime work was to be performed. If that individual declined to work on the overtime, the work was offered to the other janitors. An attempt was made by Haas to distribute equally the overtime work between all of the janitors who expressed an interest in the work including Mrs. Rathbun. The overtime was not offered to a substitute janitor unless all of the regular full-time employees had refused to work.

The major source of overtime work involved the care and clean-up of the high school football stadium. During the football season, the athletic department used a tarpaulin to cover the field. This tarpaulin was placed over the playing surface whenever it was raining, and removed

after the rain stopped or when it was time to start playing the football game. This operation required the physical labors of ten or twelve people, and provided overtime to the janitorial staff at Harding and to other employees of the school system.

The removal and placement of the tarpaulin when it was wet was strenuous work, and Haas generally assigned only the male janitors to work this overtime. Several of the janitors refused this overtime because of their age or physical condition. Mrs. Rathbun informed Haas that she would like to participate in the overtime involving the football stadium. Thereafter, the plaintiff was regularly assigned to work on the clean-up crew at the stadium and received overtime. Some of this overtime was received while Mrs. Rathbun was still a regular substitute employee of the school system. However, the plaintiff was not regularly used to help with the tarpaulin, but instead was assigned the tasks of cleaning the restrooms and locker rooms. Mrs. Rathbun only worked on the tarpaulin on a few occasions, and found that she was capable of doing the work. By 1977, the athletic department stopped using the tarpaulin and started to use students to clean the stadium. These moves effectively ended the overtime work for all of the janitors at the football stadium.

In those exhibits introduced into evidence, there exist no compilations concerning how much overtime was worked by plaintiff either as a substitute or full time employee. It seems evident that though some of those who felt that certain overtime jobs then existent were "men's work", such as the erection of bleachers and the removal of field tarpaulins, such jobs were performed by Mrs. Rathbun at

her urging. It is further evident that she was given lighter duty work to do at overtime rates.

At one point during the plaintiff's history at Harding, she requested and was permitted to temporarily change her job assignment to the adjacent fieldhouse. This vacancy was created when a male janitor took an extended sick leave. While working in the fieldhouse, Mrs. Rathbun was given the overtime associated with this particular job assignment. The fieldhouse generated overtime for the janitors whenever a basketball game or wrestling match was held. This overtime was later eliminated because of an austerity program in the school system.

The plaintiff and some of her male co-workers were not compatible and were unable to work together in harmony. The plaintiff and these co-workers repeatedly complained to various of their supervisors about the conduct of the others. This disharmony eventually culminated in an incident between the plaintiff and a totally deaf and dumb co-worker who physically attacked Mrs. Rathbun. The day after this incident the school board met to administer a severe discipline against the co-worker, however, at the request of the plaintiff, the board did not discipline the man.

On May 30, 1978, the plaintiff was transferred to Devon Elementary School. This transfer was made because the business manager of the school, Nicholas Angelo, felt that the personnel problems at Harding could be resolved if Mrs. Rathbun were moved to another school. The business manager chose Devon Elementary because it was close to the plaintiff's home and was a school that only required one janitor.

While at Devon Elementary, the plaintiff received several obscene phone calls and was scared by people wearing masks. The identity of these people was never ascertained by the plaintiff even though the F.B.I. conducted an investigation into the problem. The plaintiff remained at Devon until she went on a medical leave in 1981.

During Mrs. Rathbun's employment, she had a history of absenteeism, and took several extended leaves. The plaintiff used these leaves to return to France where she would rest. The plaintiff felt these trips were necessary to improve her mental health by getting away from the job environment.

CONCLUSIONS OF LAW

Mrs. Rathbun seeks relief in this matter pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.* The filing of this action within ninety days after receipt of the Notice of Right to Sue Letter from the E.E.O.C. properly invoked the jurisdiction of this court.

In furtherance of her Title VII claim, the plaintiff has alleged that concerning her assignment of overtime work she was treated differently than the male janitors because of her sex and national origin. When disparate treatment is alleged a plaintiff must prove "(1) differences in treatment, and (2) a *discriminatory motive on the part of her employer.*" (Emphasis added.) *Underwood v. Jefferson Memorial Hospital,* 639 F.2d 455, 457 (8th Cir. 1981), *citing, International Brotherhood of Teamsters*

v. United States, 431 U.S. 324 (1977); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

In this action, Mrs. Rathbun has failed to show either of the required elements to establish a claim of discrimination predicated upon sex or national origin. The issue of overtime is, in great measure, concerned with the assignment of overtime hours in conjunction with athletic department affairs. It is clear that the janitor or custodian immediately assigned to the field in which a given athletic event was scheduled had firstcall on the employment in question. His (or her) familiarity with the building or field was the primary consideration of selecting him to work. This criteria was not based upon sex or national origin. The evidence is clear that additional workers were hired on a seniority basis with older employees in favor of service being given preference. As a general rule substitutes did not work overtime hours. Mrs. Rathbun, even in that capacity, did work and was paid though she may well have worked fewer hours then many of her male counterparts. Nothing in the evidence adduced establishes a prima facie case which supports her contention that she was denied either work or pay as a result of her sex or national origin. *Underwood v. Jefferson Memorial Hosp. supra.*

The same is true in relation to her transfer from Harding to Devon Elementary. The latter, staffed by one night janitor (Mrs. Rathbun) and one custodian was, by comparison to the high school, a small unit and work there offered small opportunity for overtime work. In the years during which plaintiff worked at Devon, she worked little extra time; those years were also ones during which the fiscal policies of the system itself were subjected to belt-

tightening efforts to reduce overtime pay. Nothing said concerning Mrs. Rathbun's employment at Devon persuades the court that while there, she was denied the opportunity to accrue overtime hours because of her sex and/or national origin.

To reach conclusions in relation to the issue—as well as to all issues raised by plaintiff and one which she has the burden of original proof—the court must determine the credibility of each witness who appeared during the course of trial. Plaintiff herself is subjected to the same testimony process. The determination of this question is vital to the reaching of this decision.

There is no doubt that plaintiff was physically assaulted by a member of the Harding janitorial staff. The degree of her injuries is open to some question. Other complaints of harassment were made by plaintiff and evidence was adduced concerning the physical affect (not the cause) of the actions of one or more persons unknown to plaintiff and therefore to the court.

To attribute to defendants or others associated with them—or any of them—the acts of making obscene phone calls, placing razor blades in plaintiff's soap supplies, frightening her during working hours, stretches the power of the court to make such attributions on the basis of the evidence before it.

But harassment and intimidation take many forms, some much more subtle than those instances referred to above. Plaintiff complains that fellow employees referred to her as a "French Bitch," that her work assignments were such as to isolate her, and that defendants, or some of them, established a pattern of intimidation and fear.

The evidence is clearly to the contrary. Reasonable minds, hearing the testimony of plaintiff and her witnesses could not disagree that her transfer to Devon from Harding was not motivated by her sex or nationality but to remove her from a position in which her troubles with her fellow janitor and custodian had begun to affect the morale of the entire Harding staff. There is no evidence that plaintiff's work was anything but good while employed at any post assigned to her: East Junior High, Harding High School or Devon. But while her personal testimony elicits discriminatory and sexist statements of men fellow employees, her own witnesses negate such charges with their statements concerning the same incidents. In the face of such evidence, there is no reason to believe that her transfer from one school to another was some form of punishment imposed upon her because of her work related activities. It should be added that even if statements were made to plaintiff by her fellow employees as claimed, such statements were isolated in nature and hardly assume Constitutional proportion.

The totality of the evidence establishes further that certain complaints of plaintiff were brought to the attention of the Board of Education on at least one occasion. In 1978, Nick Angelo was contacted by the Ohio Civil Rights Commission and gave it certain paperwork and records pertaining to plaintiff at that time. It is Mr. Angelo's belief that he met with members of the Board and school and administrative staff. Minutes of the meeting were taken by the secretary of the union (not the Board secretary). These minutes are not present in evidence. During the period 1978-9, Mr. Angelo "probably" had conversations concerning plaintiff with various mem-

bers of the Board of Education. The content of these conversations is not known with any specificity. In sum, the record is absolutely barren of any evidence whatsoever indicative of the fact that the Board, the acknowledged employer of plaintiff in this case, did anything to discriminate against plaintiff. Indeed, if the Board were made aware of any acts of claimed discrimination, we are not privy to that awareness. Further, in the same vein, there is no evidence to indicate that individual Board members acted in any manner to suggest that they should be encumbered with personal liability to plaintiff in this cause. Lastly, there is no evidence tending to indicate that the Board, or any member thereof, acted so as to participate or encourage or ratify that conduct, if any, which could have been considered violative of plaintiff's Constitutional rights.

Accordingly, the plaintiff's claims are hereby dismissed with prejudice to Rule 41(b) of the Federal Rules of Civil Procedure.

IT IS SO ORDERED.

/s/ Sam H. Bell
U. S. DISTRICT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 85-3986/3987

IN RE: ALAN MILES RUBEN,

Attorney-Appellant (85-3987).

JEANNE RATHBUN,

Plaintiff-Appellant (85-3986),

v.

WARREN CITY SCHOOLS, et al.,

Defendants-Appellees.

Before: WELLFORD and NORRIS, Circuit Judges; and COHN District Judge.

JUDGMENT

(July 30, 1987)

ON APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said district court in this case be and the same is hereby reversed as to the sanctions against plaintiff and her attorney and taxation of costs against plaintiff, and remand the case for further consideration not inconsistent with this opinion.

IT IS FURTHER ORDERED that Appellants recover from Appellee the costs on appeal, as itemized below, and that execution therefor issue out of said district court, if necessary.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk

/s/ John P. Hehman
Clerk

(SEAL)

A True Copy.

Issued as Mandate: August 25, 1987

Attest:

/s/ Gary McCarthy
Deputy Clerk

COSTS: None

Filing fee .....$

Printing .....$

Total .....$